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Children of Assisted Reproduction

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Kristine S. Knaplund*

More than three decades after the birth of the first child conceived through in vitro fertilization, few states have comprehensive statutes to establish the parentage of children born using assisted reproduction techniques (ART). While thousands of such children are born each year, courts struggle to apply outdated laws. For example, does a statute terminating paternity for a man who donates sperm to a married woman apply if the woman is unmarried? In 2008, the Uniform Probate Code (UPC) added two much-needed sections on the complicated parentage and inheritance issues that arise in the field of assisted reproduction. Yet it is unclear whether states will enact these new UPC sections; few states have enacted comparable provisions of the Uniform Parentage Act (UPA). The issues can be controversial, particularly regarding children born years after an intended parent's death, or when the discussion turns to enforcement of a contract for a gestational carrier, the preferred term for a surrogate mother.

This Article explores the legal landscape for children conceived through assisted insemination, in vitro fertilization, intracytoplasmic sperm injection, and other techniques. The Article discusses the differences between the UPA and UPC sections that concern assisted reproduction. It examines the critical normative and ethical questions answered by these statutes and analyzes the likelihood that states will adopt either uniform act. The Article looks briefly at gestational carrier agreements to consider whether and how they should be enforced. The Article concludes by noting the need for legislation, the virtues of the UPC over the UPA, and the hope that states will address all those who use ART, including gay and lesbian couples, and single parents.

INTRODUCTION

Louise Brown, the first child conceived through *in vitro* fertilization, is about to celebrate her 34th birthday.¹ Today, thousands of children are born each year using assisted reproduction techniques such as assisted insemination, *in vitro* fertilization, donation of sperm and ova (unfertilized eggs), and gestational carriers.² Despite the

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* Professor of Law, Pepperdine School of Law. The Author wishes to thank the American College of Trust and Estate Counsel, the *Michigan Journal of Law Reform* and Clara Presler, Professors Ronald Chester, Susan Gary and Lawrence Waggoner, and research librarian Jennifer Allison.

1. Fergus Walsh, *30th Birthday For First IVF Baby*, BBC NEWS (July 14, 2008), <http://news.bbc.co.uk/go/pr/fr/-/2/hi/health/7505635.stm>.

2. "Gestational carrier" or "gestational mother" is the preferred term now, rather than "surrogate" or "surrogate mother," for reasons explained in the Comments to the Uniform

rapid increase in assisted reproduction over the past decades, few states have comprehensive statutes to establish the parentage of these children.³ As a result, courts struggle to apply outdated laws and wrestle with questions such as whether a statute terminating paternity for a man who donates sperm to a married woman applies if the recipient is unmarried.⁴ If the statute addresses paternity for donated sperm when assisted insemination is used, does it apply to *in vitro* fertilization as well?⁵ Does the same statute apply if ova are donated rather than sperm?⁶ The legal climate is more uncertain if a gestational carrier is used. In addition to legal wrangling over whether a contract with the carrier is enforceable and under what terms, courts must grapple with statutes that, in certain cases, allow a man to deny paternity but create an irrebuttable presumption that the woman who gives birth is the mother.⁷

In 2008, the Uniform Probate Code (UPC) added two new and much-needed sections on the complicated parentage and inheritance issues that arise in the field of assisted reproduction.⁸ The sections, 2-120 and 2-121, fill previous gaps with five key provisions. First, in contrast to existing legislation in many states, the statutes address the donation of all reproductive material—sperm, ova, and preembryos—and not simply sperm.⁹ Second, the UPC sections apply to all participants in assisted reproduction technologies—married and unmarried, heterosexual and same-sex, partnered and single¹⁰—again in contrast to many state statutes.¹¹ Third, the UPC

Parentage Act Article 8: the term “surrogate” is inaccurate, misleading, and potentially negative, while the term “gestational mother” is “both more accurate and more inclusive” because it includes both a woman who performs the gestational function without a genetic tie to the child, and a woman who is both the gestational and genetic mother of the child. UNIF. PARENTAGE ACT, Article 8 cmt. (2002), 9B U.L.A. 75 (Supp. 2011). For an explanation of the terminology, see Charles P. Kindregan, Jr., *Considering Mom: Maternity and the Model Act Governing Assisted Reproductive Technology*, 17 AM. U. J. GENDER SOC. POL’Y & L. 601, 609–10 (2009).

3. See *infra* notes 96–105 and accompanying text.

4. See, e.g., *In re Adoption of Michael*, 636 N.Y.S.2d 608, 609 (Sur. Ct. 1996).

5. See *In re Parentage of J.M.K. & D.R.K.*, 155 Wash.2d 374, 392 (2005) (holding that, because “the process of artificial insemination is completely different from the process [sic] *in vitro* fertilization [IVF],” a Washington assisted insemination statute did not apply to children conceived through IVF. The statute has since been amended.); *Finley v. Astrue*, 372 Ark. 103, 111 (2008) (asserting that assisted insemination and IVF are “two completely different procedures” and thus an AI statute does not apply to children conceived through IVF using deceased husband’s frozen sperm).

6. See, e.g., *Dantzig v. Biron*, No. 07-CA-1, 2008 Ohio App. LEXIS 180 (Jan. 18, 2008) (dismissing a parentage action for failure to include a necessary party, the unnamed egg donor).

7. See, e.g., *Soos v. Superior Court*, 182 Ariz. 470, 475 (1994); *J.R. v. Utah*, 261 F. Supp. 2d 1268, 1280 (D. Utah 2003).

8. See *infra* Part II.

9. See *infra* Part II.A.

10. See *infra* notes 43–49 and accompanying text.

addresses assisted reproduction techniques, such as *in vitro* fertilization, in addition to assisted insemination.¹² Fourth, the UPC addresses issues of maternity in cases such as the use of a gestational carrier, or instances in which the birth mother has no genetic connection to the child.¹³ Finally, now that thousands of couples are cryopreserving their preembryos for long periods of time, the UPC covers instances in which the intended parents have divorced or one parent has died before the preembryos are implanted.¹⁴

Will states enact these new UPC sections? Earlier efforts to enact uniform laws regarding the parentage of children of assisted reproduction have met with little success.¹⁵ Few states have enacted comparable provisions of the Uniform Parentage Act (UPA), which, in many ways, duplicate the parentage and inheritance provisions of the UPC.¹⁶ In several critical areas, however, the Uniform Probate Code sections differ markedly from the Uniform Parentage Act: the UPC includes all those who use assisted reproduction and enacts an overly broad presumption regarding the parentage of children born years after an intended parent's death.¹⁷ These differences between the UPC and UPA mean that the UPC is far more controversial.¹⁸

This Article begins by exploring the current legal landscape for children of assisted reproduction—those who are *not* conceived through sexual intercourse, but rather through assisted insemination (AI),¹⁹ *in vitro* fertilization,²⁰ intracytoplasmic sperm

11. See *infra* notes 96–105 and accompanying text.

12. See *infra* Part II.A.

13. See *infra* Part II.B.

14. See *infra* Part II.A.3.

15. The National Conference of Commissioners on Uniform State Laws (NCCUSL) first drafted the Uniform Parentage Act in 1973 to address the parentage of nonmarital children. In 2000 and 2002, NCCUSL amended the UPA to include children conceived using assisted reproduction techniques. See UNIF. PARENTAGE ACT, Prefatory Note (2002), 9B U.L.A. 5 (Supp. 2011). For example, only Texas and Utah have adopted UPA Section 801(b) regarding parentage when a gestational carrier is used. TEX. FAM. CODE ANN. § 160.754 (West 2006); UTAH CODE ANN. § 78B-15-801 (LexisNexis 2008).

16. UNIF. PARENTAGE ACT Article 7 cmt. & Article 8 cmt. (2002), 9B U.L.A. 67, 74–75 (Supp. 2011).

17. See *infra* part II.

18. Cf. *infra* part III.B *passim*.

19. Assisted insemination, also called artificial insemination or intrauterine insemination, involves inserting the sperm into the woman's cervix by means of a syringe or other device. See CTRS. FOR DISEASE CONTROL & PREVENTION, 2009 ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES 544 (2011) [hereinafter 2009 ART SUCCESS RATES], available at http://www.cdc.gov/art/ART2009/PDF/ART_2009_Full.pdf.

20. *In vitro* fertilization requires collecting the sperm and the ova, and combining them in the laboratory. Once the sperm has fertilized the egg, the resulting preembryo is implanted in the woman. *Id.*

injection,²¹ and other laboratory techniques that handle the sperm, egg, or both. Section II explores the provisions of, and discusses the main differences between, the sections of the Uniform Parentage Act and the Uniform Probate Code that concern assisted reproduction. These sections are Articles 7 and 8 of the UPA, and Sections 2-120 and 2-121 of the UPC. For children born without a gestational carrier (a situation governed by Article 7 of the UPA and Section 2-120 of the UPC), the two principal differences concern establishing consent to assisted reproduction²² and references to same-sex couples and single parents. In addition, only the UPC mandates timetables for assisted reproduction after an intended parent has died. For children born using a gestational carrier (a situation governed by Uniform Parentage Act Article 8 and Uniform Probate Code Section 2-121), key distinctions include the UPA's extensive court involvement in the gestational agreement and the UPC's gender-neutral terms that allow application to same-sex couples.

Section III analyzes the likelihood that states will adopt either uniform act by examining critical normative and ethical questions answered by these statutes. First, how should consent to ART be established, especially consent to be a parent after death? Second, if a decedent is found to be a parent of a child conceived years after his or her death, does this encourage the postmortem retrieval of gametes (sperm and ova) without the decedent's consent? Should single parents and same-sex couples be included in the statutes, or should the statutes determine parentage only for children of heterosexual couples? Finally, Section III looks briefly at gestational carrier agreements to consider whether and how they should be enforced. Section IV concludes the Article by noting the

21. Intracytoplasmic sperm injection, developed in the 1990s, involves inserting a single sperm into an egg and then implanting the resulting preembryo. *Id.*

22. Requiring evidence of consent for assisted reproduction might strike some as odd. For children conceived through coitus, consent to be a parent is not a consideration. Even if the child was conceived under criminal or fraudulent circumstances (for example, a false promise of infertility), the progenitors are still the parents of the resulting child. *See* I. Glenn Cohen, *The Right Not to Be a Genetic Parent?*, 81 S. CAL. L. REV. 1115, 1128 & nn.37-38 (2008). In contrast, when a child is conceived using assisted reproduction, the public policy considerations are quite different, and consent (or rather, *intent* to be the parent) needs to be established. UNIF. PARENTAGE ACT § 704 cmt. (2002), 9B U.L.A. 69-70 (Supp. 2011) ("Consent to Assisted Reproduction" requires consent by the woman and man who intend to be the parents of a child born using ART to be in a record signed by the woman and the man). In many instances involving assisted reproduction, the biological parent does not intend to be the parent of the child. As Professor Schultz observed, "the choices generated by modern reproductive technology have made personal intention a far more significant factor in procreation and parenthood." Marjorie Maguire Schultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity For Gender Neutrality*, 1990 WIS. L. REV. 297, 300.

need for legislation in the area of assisted reproduction, the virtues of the UPC over the UPA, and the hope that state legislation will address the needs of all those who use assisted reproduction.

I. A BRIEF DESCRIPTION OF ASSISTED REPRODUCTION

Assisted reproduction techniques (ART) include a range of procedures that vary in complexity. All have one thing in common: ART does *not* include reproduction through sexual intercourse. In this Article, ART refers to procedures that enable human pregnancy through the handling of sperm, eggs, or both, outside of the human body. ART is often, but not exclusively,²³ used to overcome infertility. The simplest ART, and the first to be widely available, is assisted (or artificial) insemination (AI), in which sperm is transferred to a woman's uterus or cervix with a syringe or similar device.²⁴ A medical professional is not necessary for AI.²⁵ If the sperm provider is married to the woman being inseminated, the procedure is called AIH (assisted insemination by husband). If the woman's male partner is sterile or has a low sperm count, or if the woman has no male partner, then AID (assisted insemination by donor) can be used.

23. For example, a fertile couple with a genetic history of Tay-Sachs disease (a disorder that damages the brain and nerve cells) or cystic fibrosis (an inherited disease that causes serious breathing problems and lung disorders) might use *in vitro* fertilization in order to decide which preembryo to implant. Once the sperm and egg have successfully joined in a petri dish, and the resulting preembryo has started dividing, one cell is removed from the preembryo for preimplantation genetic diagnosis (PGD). A preembryo that has the genetic markers for Tay Sachs or cystic fibrosis is discarded, and a preembryo free of the markers is implanted. In a 2006 survey conducted by the Genetics and Public Policy Center at Johns Hopkins University, more controversial uses of PGD were also documented. For example, the survey found that 42% of ART clinics provided PGD for non-medical sex selection (i.e., sex selection for family balancing, rather than to avoid a genetic disease caused by a mutation on the X chromosome). Susannah Baruch, *Preimplantation Genetic Diagnosis and Parental Preferences: Beyond Deadly Disease*, 8 HOUS. J. HEALTH L. & POL'Y 245, 253 (2008). Some have argued that parents have a duty to use PGD to select their children. See, e.g., Julian Savulescu & Guy Kahane, *The Moral Obligation to Create Children with the Best Chance of the Best Life*, 23 BIOETHICS 274 (2009). The lack of regulation on the use of PGD has prompted calls for oversight. See, e.g., Jaime King, *Predicting Probability: Regulating the Future of Preimplantation Genetic Screening*, 8 YALE J. HEALTH POL'Y L. & ETHICS 283, 337 (2008) (proposing a new regulatory body to oversee PGD, which the author calls "preimplantation genetic screening").

24. See INSEMINATION HELP, <http://www.insemination-help.com> (last visited Feb. 18, 2012) (explaining under the subtitle *Instructions for Artificial Self Insemination* how to inseminate at home and offering kits for sale for self insemination).

25. *Jhordan C. v. Mary K.*, 224 Cal. Rptr. 530, 535 (Cal. Dist. Ct. App. 1986) ("Artificial insemination is, as demonstrated here, a simple procedure easily performed by a woman in her own home.").

In vitro fertilization (IVF) is far more complicated, and always requires medical involvement. In IVF, the sperm and the egg are combined in the laboratory, often by intracytoplasmic sperm injection (ICSI) that injects a single sperm directly into the egg.²⁶ Once the sperm has fertilized the egg and the egg has begun dividing, the resulting preembryo is transferred from the lab to be implanted in the birth mother. IVF can involve a couple's own gametic material, or the sperm, egg, or both can be donated.²⁷

The least frequently used ART,²⁸ and arguably the most controversial,²⁹ involves a surrogate or gestational carrier. The term

26. 2009 ART SUCCESS RATES, *supra* note 19, at 544. The Report found that, nationally, ICSI was used in 65% of the cycles of reporting clinics. *Id.* at 91. The percentage has increased steadily since 1998, when ICSI was used in 40% of the cycles reported to the CDC. CTRS. FOR DISEASE CONTROL & PREVENTION, ASSISTED REPRODUCTIVE TECHNOLOGY: NATIONAL SUMMARY REPORT [hereinafter ART NATIONAL SUMMARY REPORT], available at, <http://apps.nccd.cdc.gov/art/Apps/NationalSummaryReport.aspx> (select year 1998 from the pull-down menu).

27. The 2009 CDC report found that IVF was used in more than 99% of the cycles; that percentage has been unchanged since 2001. ART NATIONAL SUMMARY REPORT, *supra* note 26. Other ART procedures are not frequently used, and thus will not be discussed in this Article. Those include GIFT (gamete intrafallopian transfer), "removing eggs from the woman's ovary, combining them with sperm, and using a laparoscope to place the unfertilized eggs and sperm into the woman's fallopian tube through small incisions in her abdomen," and ZIFT (zygote intrafallopian transfer) in which a fertilized egg is surgically implanted into a woman's fallopian tube. 2009 ART SUCCESS RATES, *supra* note 19, at 544, 545 (providing definitions of GIFT and ZIFT). From 2001 to the most recent CDC Report on ART (2009), each CDC National Summary has found that GIFT and ZIFT were used less than 1 percent of the time by reporting clinics. *See* ART NATIONAL SUMMARY REPORT, *supra* note 26.

28. One report estimates a total of 14,000 to 16,000 gestational carrier or surrogate pregnancies through 2002. Deborah Morgenstern Katz, *Womb for Rent*, PARENTING MAGAZINE, Dec./Jan. 2002 at 86, 88.

29. *See, e.g.*, Anita Allen, *The Black Surrogate Mother*, 8 HARV. BLACKLETTER J. 17, 18 (1991) ("Affluent white women's infertility, sterility, preferences and power threaten to turn poor Black women, already understood to be a servant class, into a 'surrogate class.'") (internal citation omitted). Allen calls for a per se ban on commercial surrogacy as "the safest—the wisest—course" for Black women. *Id.* at 31. *See also* April L. Cherry, *Nurturing in the Service of White Culture: Racial Subordination, Gestational Surrogacy and the Ideology of Motherhood*, 10 TEX. J. WOMEN & L. 83, 128 (2001) ("By asking who is the 'real' or natural or legal mother in the gestational surrogacy cases, the courts mask the use of White power over the maternity of Black women, further devaluing the affectional ties Black women have not only with White children but with Black children as well."); Michelle Ford, *Gestational Surrogacy is Not Adultery: Fighting Against Religious Opposition to Procreate*, 10 BARRY L. REV. 81, 97–100 (2008) (describing religious opposition to gestational surrogacy, and concerns for the economic exploitation of poor women); Lisa C. Ikemoto, *Destabilizing Thoughts on Surrogacy Legislation*, 28 U.S.F. L. REV. 633, 641–45 (1994) (describing how "patriarchy, white supremacy, heterosexism and class hierarchy" influence laws on reproduction, including surrogacy); Kevin Tuininga, *The Ethics of Surrogacy Contracts and Nebraska's Surrogacy Law*, 41 CREIGHTON L. REV. 185, 192–204 (2008) (addressing concerns of commodification, exploitation of women, profiteering surrogacy agencies, class and race problems in surrogacy selection, and issues of satisfaction and suitability of the intended parents); Katherine B. Lieber, Note, *Selling the Womb: Can the Feminist Critique of Surrogacy be Answered?*, 68 IND. L.J. 205, 211 (1992)

“surrogate” will be used in this Article to refer to a woman who is carrying her own genetic child but has agreed to relinquish the child to the intended parents once the child is born. “Gestational carrier” refers to a woman who, like the surrogate, has agreed to relinquish the child, but unlike the surrogate, has no genetic connection to the child.³⁰

Since 2002, the Centers for Disease Control & Prevention (CDC) has found that less than 1 percent of the ART cycles³¹ each year involve a gestational carrier.³² However, the CDC Reports include only ART in which the egg or the preembryo is handled outside the body, and thus exclude all cases in which only AI is used.³³ Still, since *In re Baby M*,³⁴ which held that the surrogate (the genetic mother and birth mother) was the legal mother of a child conceived through ART, traditional surrogacy is rarely used.³⁵ Instead, the gestational carrier’s eggs are *not* used, meaning that IVF is necessary. The new UPC amendments, like UPA Articles 7 and 8, encompass all the forms of ART described above.

II. THE NEW UPC AMENDMENTS CONTRASTED WITH THE UNIFORM PARENTAGE ACT

The two new UPC amendments on assisted reproduction apply to an ART child for whom the birth mother is an intended parent

(asserting that while some feminists see surrogacy as a reproductive choice, “most feminist writers see surrogacy as a form of slavery or prostitution”).

30. North Dakota, by statute, differentiates between a gestational carrier (in which the egg and sperm of the intended parents are implanted in a woman) and a surrogate. N.D. CENT. CODE § 14-18-01 (2009). Surrogate contracts are void in North Dakota, § 14-18-05, while gestational carrier contracts are enforceable, and a child born to a gestational carrier is a child of the intended parents for all purposes, § 14-18-08.

31. The CDC reports the number of cycles that were started each year at an ART clinic, not the number of people who were treated. A cycle begins when a woman takes hormones “to stimulate egg production or starts ovarian monitoring with the intent of having embryos transferred.” CTRS. FOR DISEASE CONTROL & PREVENTION, 2008 ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES 4 (2010) [hereinafter 2008 ART SUCCESS RATES], available at http://www.cdc.gov/art/ART2008/PDF/ART_2008_Full.pdf.

32. ART NATIONAL SUMMARY REPORT, *supra* note 26.

33. The CDC ART Reports define ART as “[a]ll treatments or procedures that involve surgically removing eggs from a woman’s ovaries and combining the eggs with sperm to help a woman become pregnant.” 2009 ART SUCCESS RATES, *supra* note 26, at 537.

34. 537 A.2d 1227, 1234 (N.J. 1988).

35. Steven H. Snyder & Mary Patricia Byrn, *The Use of Prebirth Parentage Orders in Surrogacy Proceedings*, 39 FAM. L.Q. 633, 640 (Fall 2005). Accord UNIF. PARENTAGE ACT, Article 8 cmt. (2002), 9B U.L.A. 75 (Supp. 2011) (noting that using a gestational carrier who is also the genetic mother “is now typically avoided by the majority of ART practitioners in order to decrease the possibility that a genetic/gestational mother will be unwilling to relinquish her child to unrelated intended parents”).

in Section 2-120, “Parent-Child Relationship: Child Conceived by Assisted Reproduction Other than a Child Born to a Gestational Carrier,” and to an ART child for whom the birth mother is not the intended parent in Section 2-121, “Parent-Child Relationship: Child Born to a Gestational Carrier.” Section 2-121 applies both when the gestational carrier is the genetic parent of the child because her own egg is used, and when a donated egg is used to conceive the child. In the latter instance, the gestational carrier only has a biological connection, not a genetic connection, to the child. The following section first examines Section 2-120 through its effects on those using their own gametes, those using donated gametes, and single mothers conceiving and giving birth after the death of an intended parent. The discussion then turns to Section 2-121 and the parentage issues that arise when a gestational carrier is the birth mother.

A. Section 2-120: Parent-Child Relationship: Child Conceived by Assisted Reproduction Other Than a Child Born to a Gestational Carrier

UPC Section 2-120 applies when the birth mother intends to be a legal parent of the child and no gestational carrier is used. Because ART can be used with or without donated gametes, and may occur even after one of the intended parents has died, Section 2-120 addresses three types of parentage issues: (1) parentage of an ART child where the living intended parents are the genetic parents, (2) parentage of an ART child conceived with donated gametes, and (3) parentage of an ART child conceived after the death of one intended parent.³⁶

1. Parentage of an ART Child Where the Living Intended Parents Are Also the Genetic Parents

The new UPC amendments clarify parentage in this least controversial case in which a heterosexual couple uses its own gametes to produce a child the couple intends to raise.³⁷ Here, genetic par-

36. If both intended parents have died, a gestational carrier is necessary and Section 2-120 does not apply.

37. How often this scenario occurs is impossible to calculate from the CDC statistics. CDC reporting requirements establish when donor *eggs* or *preembryos* are used in IVF, but there is no comparable reporting requirement for when donor *sperm* is used. Additionally, if a couple uses assisted insemination but not IVF, they are not included in the CDC report at all. Most IVF cycles involve using the woman's own eggs: for example, in 2008 the CDC found that 87.8 percent of all reported cycles used nondonor eggs, either fresh (70.7 percent) or frozen (17.1 percent). See 2008 ART SUCCESS RATES, *supra* note 31, at 16.

entage coincides with intended parentage. Accordingly, the birth mother is also the genetic mother. If the intended parents are a married heterosexual couple, the UPC declares that the woman who gives birth is the child's mother³⁸ and her husband is the father,³⁹ unless the couple was divorced or the father withdrew his consent to be a parent before the preembryo was implanted.⁴⁰ Even then, the UPC would presume his consent and deem him a legal parent if he "functioned as a parent of the child no later than two years after the child's birth."⁴¹ The UPC makes clear that a husband who provides his sperm, or a wife who provides her eggs for IVF, is not a "third party donor."⁴²

The UPC does not limit its coverage to married couples. The amendments use gender-neutral terms to cover all those creating a child through ART.⁴³ Thus, for an unmarried couple using its own sperm and eggs, in which the birth mother is the intended mother, the UPC declares that a parent-child relationship exists between the ART child and the birth mother.⁴⁴ The male partner (there are no donated gametes in this scenario, so her partner must be male) is the other intended parent if he gave his written consent either before or after the child was born, or if he functioned as a parent no later than two years after the child's birth.⁴⁵ As with married couples, a man who has given his written consent is not the parent if he withdraws that consent, in writing, before the gametes are implanted.⁴⁶

In many ways, the UPC reaches the same conclusions as to parentage as the UPA, although it differs in its definition of implied consent. The UPA requires either written consent to be a parent or that "the woman and the man, during the first two years of the child's life resided together in the same household with the child and openly held out the child as their own."⁴⁷ In contrast, the UPC

38. UNIF. PROBATE CODE § 2-120(c) (2011), 8 U.L.A. pt. I, at 57 (Supp. 2011).

39. § 2-120(d), 8 U.L.A. pt. I, at 57 (Supp. 2011).

40. §§ 2-120(i) (divorce), 2-120(j) (withdrawal of consent), 8 U.L.A. pt. I, at 58 (Supp. 2011). These two exceptions mirror UPA Section 706.

41. § 2-120(f)(2)(A), 8 U.L.A. pt. I, at 58 (Supp. 2011).

42. § 2-120(a)(3), 8 U.L.A. pt. I, at 57 (Supp. 2011).

43. See, e.g., UNIF. PROBATE CODE § 2-120(f), 8 U.L.A. pt. I, at 58 (Supp. 2011) (referring to an "individual other than the birth mother who consented to assisted reproduction by the birth mother with intent to be treated as the other parent of the child.")

44. § 2-120(c), 8 U.L.A. pt. I, at 57 (Supp. 2011).

45. § 2-120(f)(1) (signed writing), 2-120(f)(2)(A) (functioned as a parent), 8 U.L.A. pt. I, at 58 (Supp. 2011). Section 2-120(g) places further requirements on an individual who signed a record more than two years after the child's birth, in order for that individual or his relatives to inherit from the child. See § 2-120(g), 8 U.L.A. p. I, at 58 (Supp. 2011).

46. § 2-120(j), 8 U.L.A. pt. I, at 58 (Supp. 2011).

47. UNIF. PARENTAGE ACT § 704 (2002), 9B U.L.A. 69 (Supp. 2011).

requires that a person “functioned as a parent” no later than two years after the child’s birth.⁴⁸ As Professor Gary has pointed out, the differences in language may lead to inconsistent results: under the UPC, a man may be declared a parent for inheritance purposes, but would not be a parent for purposes of custody, visitation, and child support under the UPA.⁴⁹

2. Donated Gametes

When couples use their own gametes, the UPC and the UPA generally agree on the legal parents of an ART child. If the birth mother is married, she and her husband will be the parents. If the birth mother is unmarried, the UPC continues the work of the UPA to establish parentage regardless of marital status, by providing ways in which courts can find the birth mother’s partner to be a parent of the child. The UPC departs from the UPA if the couple or a single parent elects to use donated sperm, eggs, or preembryos. The UPC provides a much broader definition of a “donor” than the original UPA, including all donated gametes and not just sperm. The UPC also differs from the UPA in its use of gender-neutral terms, determining parentage in cases of same-sex couples and single parents.

The first version of the UPA, adopted in 1973, determined paternity in a single scenario: sperm donated by a man for use by a married woman who was not the donor’s wife. If the sperm was provided to a licensed physician, the donor was not the child’s father. The relevant section, UPA § 5(b), stated: “The donor of semen provided to a licensed physician for use in artificial insemination of a married woman other than the donor’s wife is treated in law as if he were not the natural father of a child thereby conceived.”⁵⁰ Litigation arose when, for example, a man provided the sperm directly to the woman rather than through a doctor,⁵¹ or if

48. UNIF. PROBATE CODE § 2-120(f)(2) (A (2011), 8 U.L.A. pt. I, at 58 (Supp. 2011).

49. Susan Gary, *We Are Family: The Definition of Parent and Child for Succession Purposes*, 34 ACTEC J. 171, 177 (2008); see also Lee-ford Tritt, *Technical Correction or Tectonic Shift: Competing Default Rule Theories Under the New Uniform Probate Code*, 61 ALA. L. REV. 273, 299 (2010).

50. UPA Section 5(b) is still in force in several states. See, e.g., MO. REV. STAT. § 210.824 (2000); NEV. REV. STAT. § 126.061 (2011); N.J. STAT. ANN. § 9:17-44 (West 2002).

51. See, e.g., *Jordan C. v. Mary K.*, 224 Cal. Rptr. 530 (Cal. Ct. App. 1986) (holding that a man who provided his semen to a woman for assisted insemination was the child’s legal father because the procedure in the statute, to provide the semen to a physician, was not followed); *E.E. v. O.M.G.R.*, 20 A.3d 1171 (N.J. Super. Ch. 2011). *Contra* *Ferguson v. McKiernan*, 940 A.2d 1236 (Pa. 2007) (in absence of statute, upholding an agreement between known sperm donor and birth mother that sperm donor would not be liable for child support).

the man's sperm was used by an unmarried woman.⁵² The 2002 UPA, in contrast, simply stated, "A donor is not a parent of a child conceived by means of assisted reproduction."⁵³ UPC Sections 2-120 and 2-121 track the 2002 UPA, providing that, "[a] parent-child relationship does not exist between a child of assisted reproduction and a third-party donor,"⁵⁴ and thus change the definition of donor from the 1973 UPA. UPC Section 2-120 defines a third-party donor as "an individual who produces eggs or sperm used for assisted reproduction, whether or not for consideration." The UPC clarifies that its definition of "third-party donor" does not include individuals who are married; that is, it would exclude a husband who provides sperm to his wife and a wife who provides eggs for her own use.⁵⁵ The more recent statutes have also eliminated the requirement that the sperm be provided to a licensed physician.⁵⁶

The UPC's main departure from the UPA is in the UPC's gender-neutral language for intended parents. UPC Section 2-120 allows both partners in a same-sex couple to be a child's legal parents.⁵⁷ In contrast, the UPA operates on the assumption of a heterosexual couple. UPA Section 703, for example, establishes paternity for an ART child: "A *man* who provides sperm for, or consents to, assisted reproduction by a *woman* as provided in Section 704 with the intent to be the parent of her child, is a parent of the resulting child."⁵⁸ This differs from the language of UPC Section 2-120: "A parent-child relationship exists between a child of assisted reproduction and an *individual* other than the birth mother who consented to assisted reproduction by the birth mother with intent to be treated as the other parent of the child."⁵⁹ Although both the UPA and the UPC will recognize an unmarried man as the other parent of the

52. See, e.g., *In re Adoption of Michael*, 636 N.Y.S.2d 608, 609 (Sur. Ct. 1996) ("[W]here a man donates his sperm to a medical facility to be used for the purpose of artificial insemination, and all parties agree from the outset that they are forever to remain anonymous from each other, there is no reason why the forfeiture of the man's parental rights without further notice should depend upon 'the luck of the draw' because his sperm was utilized to impregnate a married woman instead of one who was not.").

53. UNIF. PARENTAGE ACT § 702 (2002), 9B U.L.A. 355 (2001). See Mary Patricia Bryn, *From Right To Wrong: A Critique of the 2000 UPA*, 16 UCLA WOMEN'S L.J. 163, 170 n.23 (2007) ("Article 7 clearly states that a donor is not a parent of a child conceived via ART.").

54. UNIF. PROBATE CODE § 2-120(b) (2011), 8 U.L.A. pt. I, at 57 (Supp. 2011).

55. § 2-120(a)(3), 8 U.L.A. pt. I, at 57 (Supp. 2011).

56. Compare *id.*, with UNIF. PARENTAGE ACT § 5(b) (1973) (amended 2002), 9B U.L.A. 408 (2001).

57. UNIF. PROBATE CODE § 2-120(f) (2011), 8 U.L.A. pt. I, at 58 (Supp. 2011).

58. UNIF. PARENTAGE ACT § 703 (emphasis added) (2002), 9B U.L.A. 69 (Supp. 2011).

59. UNIF. PROBATE CODE § 2-120(f) (emphasis added) (2011), 8 U.L.A. pt. I, at 58 (Supp. 2011).

child,⁶⁰ only the UPC recognizes two women (the birth mother and her partner) as a child's legal parents.⁶¹

3. Postmortem Conception

Postmortem conception, in which a preembryo is implanted in either a birth mother or a gestational carrier after the death of an intended parent, raises concerns regarding parentage and consent. Whenever a child is conceived through ART, questions may arise as to who intends to be the parent, but these issues are more complex when an intended parent has died months or even years before ART.

Both the UPC and the UPA address whether a decedent can be named the parent of an ART child if the gametes have not been implanted before the decedent's death.⁶² UPA Section 707 requires an individual to consent in writing to the use of his or her gametes to conceive a child after the individual has died. Written consent is the only way under the UPA to confer legal parentage on a decedent of a child conceived through postmortem conception.⁶³ In contrast, the UPC allows an individual to consent to be a parent of a PMC child in a variety of ways: through written consent,⁶⁴ by proof that the decedent intended to function as a parent no later than two years after the child's birth but was prevented from carrying out that intent by death,⁶⁵ or by clear and convincing evidence of intent to be treated as a parent of a PMC child.⁶⁶ The UPC creates a broad presumption of consent to be a parent of a PMC child for a married person if two conditions are satisfied: (1) the decedent's surviving spouse is the birth mother of the PMC child, and (2) at the decedent's death no divorce proceedings were pending. This presumption that the decedent has consented to be the legal parent of a PMC child applies even in cases in which the decedent's gametes were retrieved after his or her death, or the decedent's gametes were not used at all to create the PMC child.⁶⁷

60. *Id.*; UNIF. PARENTAGE ACT § 703 (2002), 9B U.L.A. 69 (Supp. 2011).

61. UNIF. PROBATE CODE § 2-120(f) (2011), 8 U.L.A. pt. I, at 58 (Supp. 2011).

62. UNIF. PARENTAGE ACT § 703 (2002), 9B U.L.A. 69 (Supp. 2011). The postmortem conception (PMC) child thus differs from the traditional posthumous child, in which the child is *in utero* at the time of the decedent's death.

63. *Id.*

64. UNIF. PROBATE CODE § 2-120(f)(1) (2011), 8 U.L.A. pt. I, at 58 (Supp. 2011).

65. § 2-120(f)(2)(B), 8 U.L.A. pt. I, at 58 (Supp. 2011).

66. § 2-120(f)(2)(C), 8 U.L.A. pt. I, at 58 (Supp. 2011).

67. § 2-120(h)(2), 8 U.L.A. pt. I, at 58 (Supp. 2011); *see also* Kristine S. Knaplund, *The New Uniform Probate Code's Surprising Gender Inequities*, 18 DUKE J. GENDER L. & POL'Y 335, 344 (2011).

The UPC also differs from the UPA in placing a time limit for PMC, thus allowing probate to close.⁶⁸ The UPC requires that the PMC child must be *in utero* within 36 months of the decedent's death, or born within 45 months of the decedent's death.⁶⁹ The time limits are designed to allow sufficient time for the surviving partner to grieve while allowing administration of the decedent's estate to proceed in a timely manner.⁷⁰

*B. Section 2-121. Parent-Child Relationship:
Child Born to a Gestational Carrier*

A second amendment to the UPC, Section 2-121, establishes parentage of a child born pursuant to an agreement with a gestational carrier. In this instance, the birth mother does *not* intend to be the legal mother of the child. Rather, she agrees in advance to gestate and give birth to the child, and then surrender the child to the intended parent(s). The new UPC, like the UPA, generally provides that the gestational carrier (and her husband, if she is married) is not a parent of the child and the intended parents are the parents of the child. However, there are three important differences between the UPC and UPA in the area of gestational carriers: (1) the UPC uses gender-neutral language while the UPA assumes the intended parents are a man and a woman; (2) the UPC upholds the enforceability of the parentage agreement even if the gestational carrier contract is otherwise unenforceable under state law, while in contrast, the UPA requires judicial approval of the agreement in a process akin to adoption; and (3) the UPC provides several ways to establish consent to be a parent of a PMC child, while the UPA contemplates only written consent.⁷¹ These three key differences between the UPC and the UPA will be addressed in turn.

68. UNIF. PROBATE CODE § 2-120(k)(1) (2011), 8 U.L.A. pt. I, at 58 (Supp. 2011).

69. The official comment explains why both time limits are included: If the PMC child is conceived through IVF at a medical clinic, there usually are accurate records as to the exact date that the child is *in utero*. If the date of successful implantation is lacking, the second alternative, birth within 45 months of decedent's death, can be used. § 2-120(k) cmt., 8 U.L.A. pt. I, at 62 (Supp. 2011).

70. Sheldon F. Kurtz & Lawrence W. Waggoner, *The UPC Addresses the Class-Gift and Intestacy Rights of Children of Assisted Reproduction Technologies*, 35 ACTEC J. 30, 36 (2009).

71. The UPA also includes provisions restricting the terms of the contract that are absent from the UPC. See, e.g., UNIF. PARENTAGE ACT § 801(f) (2002), 9B U.L.A. 76 (Supp. 2011): "A gestational agreement may not limit the right of the gestational mother to make decisions to safeguard her health or that of the embryos or fetus."

1. The UPC's Gender-Neutral Language

As with UPC Section 2-120, the new UPC section concerning a child born to a gestational carrier does not assume that the intended parents are male and female. The UPA contemplates a heterosexual couple contracting with the prospective gestational mother. In authorizing a court to approve the gestational carrier agreement, the UPA requires, *inter alia*, that “[t]he man and woman who are the intended parents must both be parties to the gestational agreement.”⁷² As with UPC Section 2-120, UPC Section 2-121 does not use the language “man” and “woman” or even the plural “parents.”⁷³ Thus, a same-sex couple, or an individual, could contract with the gestational carrier under the UPC and be declared the parent of the resulting child. In a UPA jurisdiction, however, if a same-sex couple or individual entered into such an agreement, a court would not validate the contract since it would not comply with UPA Section 801(b).⁷⁴ As a result, the gestational carrier would be the child’s mother pursuant to UPA Section 809.

2. Enforceability of Gestational Carrier Agreement

The second key difference between the UPC and the UPA is the enforceability of a contract with the gestational carrier. The UPA is designed to make certain agreements legally binding and enforceable if a court finds that the UPA’s requirements have been met.⁷⁵ The UPA declares that a gestational agreement that is not judicially validated is not enforceable,⁷⁶ although the individuals who intended to be the parents of the resulting child are still liable for his or her support.⁷⁷ Thus those who wish to use a gestational carrier

72. § 801(b), 9B U.L.A. 76 (Supp. 2011).

73. See, e.g., UNIF. PROBATE CODE § 2-121(d) (2011), 8 U.L.A. p. 1, at 62–63 (Supp. 2011) (“In the absence of a court order under subsection (b), a parent-child relationship exists between a gestational child and an intended parent who: (1) functioned as a parent of the child no later than two years after the child’s birth . . .”).

74. As explained in the official comment to UNIF. PARENTAGE ACT § 801 (2002), 9B U.L.A. 76 (Supp. 2011), “a valid gestational agreement requires that the man and woman who are the intended parents, whether married or unmarried, to [sic] be parties to the gestational agreement.”

75. UNIF. PARENTAGE ACT § 803 (2002), 9B U.L.A. 78 (Supp. 2011). The UPA contemplates a home study of the intended parents (unless waived by the court); a showing that the intended parents “meet the standards of suitability applicable to adoptive parents”; and a showing that all parties entered the agreement voluntarily and understand its terms. *Id.* The UPA also sets requirements regarding the payment of expenses and compensation to the gestational carrier. *Id.*

76. § 809(a), 9B U.L.A. 369 (2001).

77. § 809(c), 9B U.L.A. 369 (2001).

are funneled into a system that resembles the adoption process. If they do not get judicial validation of the agreement, either because they did not seek it or it was denied, the contract is unenforceable. The gestational carrier is deemed the child's legal mother because she gave birth to the child.⁷⁸

UPC Section 2-121, on the other hand, does not require judicial procedures to validate the contract. Indeed, it defines a gestational agreement as "an enforceable or unenforceable agreement for assisted reproduction."⁷⁹ A parent-child relationship between the intended parent and the child can be established by court order or by the intended parent functioning as a parent of the child within two years of the child's birth.⁸⁰ The gestational carrier does *not* have a parent-child relationship unless one is established by court order or she is the child's genetic mother *and* no other individual has a parent-child relationship under the section.⁸¹

3. Use of a Gestational Carrier After the Death of an Intended Parent

The UPC and the UPA also differ when a gestational carrier gives birth to a postmortem conception (PMC) child. As described above, the UPC allows an individual to consent to parent a PMC child in a variety of ways, while the UPA only recognizes written consent to parent a child conceived after an individual's death.

The UPC provides several ways to establish a parent-child relationship between a child and "an individual whose sperm or eggs were used after the individual's death . . . to conceive a child under a gestational agreement entered into after the individual's death."⁸² UPC Section 2-121(e) provides that the individual's consent to be treated as a parent of the child can be shown by:

- (1) a record, signed by the individual that, considering all the facts and circumstances, evidences the individual's intent; or

78. § 201(a)(1), 9B U.L.A. 20 (Supp. 2011).

79. UNIF. PROBATE CODE § 2-121(a)(1) (2011), 8 U.L.A. pt. I, at 62 (Supp. 2011).

80. § 2-121(d), 8 U.L.A. pt. I, at 62-63 (Supp. 2011).

81. § 2-121(c), 8 U.L.A. pt. I, at 62 (Supp. 2011). After the highly publicized case of *In re Baby M*, 537 A.2d 1227 (N.J. 1988), in which a traditional surrogate (the genetic mother of the child) was declared to be the child's legal mother, the practice has become widespread to ensure that the gestational carrier has no genetic tie to the child. One state, North Dakota, requires that this be so in order for the agreement to be enforceable in that state. *See supra* note 30.

82. UNIF. PROBATE CODE § 2-121(e) (2011), 8 U.L.A. pt. I, at 63 (Supp. 2011).

(2) other facts and circumstances establishing the individual's intent by clear and convincing evidence.⁸³

UPC Section 2-121 raises a presumption of consent to a gestational agreement after a spouse's death if three requirements are met. First, the decedent must have deposited his or her gametes (sperm or ova) before death at a time when the decedent was married to the intended second parent and no divorce proceedings were pending; second, the decedent's gametes must be used to conceive the child; and third, the decedent's surviving spouse must function as a parent of the child within two years of the child's birth.⁸⁴

III. WHICH STATUTE SHOULD STATES ADOPT TO REGULATE ART?

State legislators, in considering enactment of the 2008 UPC amendments, must address three key policy and ethical issues. First, how should consent to ART be established? Does the UPA achieve greater accuracy in carrying out an individual's intent, or is the UPC's more inclusive approach preferable? The issue of consent is especially problematic if an intended parent has died before the child is conceived, in turn raising issues of bodily integrity and procreative liberty. Second, should the statutes include all those who use ART, in particular, same-sex couples and single parents? Third, do gestational agreements resemble an adoption, or a contract between consenting adults? This section will examine these questions by contrasting the UPC and the UPA with existing state law.

83. *Id.*

84. § 2-121(f), 8 U.L.A. pt. I, at 63 (Supp. 2011). Curiously, the UPC presumptions for PMC children differ depending on whether the birth mother is the decedent's surviving spouse or the birth mother is a gestational carrier. If the birth mother is the decedent's surviving spouse, the UPC only requires that, at the time of the decedent's death, the decedent was married with no divorce proceedings pending. There is no requirement that the decedent's gametes be deposited before death, or that they even be used to conceive the PMC child. § 2-120(h)(2), 8 U.L.A. pt. I, at 63 (Supp. 2011). The presumptions arising from these two UPC sections have been criticized for requiring different based on the use or absence of a gestational carrier, and should be parallel. *See* Knaplund, *supra* note 67 at 349–50. The authors of the UPC sections, Sheldon Kurtz and Lawrence Waggoner, agree with this reform. *See* Lawrence Waggoner, Lewis M. Simes Professor of Law, University of Michigan Law School, Remarks at the University of Michigan Journal of Law Reform, Symposium: The Uniform Probate Code and the Remaking of American Succession Law (Oct. 21, 2011); RESTATEMENT (THIRD) OF PROP.: DONATIVE TRANSFERS § 14.8 cmt. k (2011) (recommending the change).

A. How Should Consent to ART Be Established?

If a married couple uses ART with its own gametes, one might wonder if a statute is needed at all. As Professor Shapo observed over twenty years ago, “A child conceived through AIH [assisted insemination by husband] presents no issues of parenthood or inheritance because the child is biologically linked to both the husband and the wife.”⁸⁵ The UPC adds a section to ensure that a husband who provided sperm to his wife, the birth mother, to conceive a child through assisted reproduction has a parent-child relationship.⁸⁶ Most states already have statutes that ensure this result. For example, California Family Code Section 7540, originally enacted in 1872, states, “Except as provided in Section 7541 [use of blood tests to determine paternity], the child of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage.”⁸⁷

Issues of parentage are more complicated, however, when the intended parents are not married to each other or when they use donated gametes. A statute is always needed when donated gametes are used.⁸⁸ Ideally, the statute resolves the parentage issues by declaring that the donor is not the parent and establishing when a person who is not genetically related to the child is the parent. Both the 2002 UPA and the new UPC state that a person who donates his sperm or her eggs for use in ART is not a parent.⁸⁹ In contrast to

85. Helene S. Shapo, *Matters of Life and Death: Inheritance Consequences of Reproductive Technologies*, 25 HOFSTRA L. REV. 1091, 1107 (1997). See also Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. REV. 227, 229 (2006) (“When the mother’s husband really is the genetic father of her child, the presumption’s operation seems unremarkable and generates virtually no controversy.”).

86. UNIF. PROBATE CODE § 2-120(d) (2011), 8 U.L.A. pt. I, at 57 (Supp. 2011). UPA Section 703 would find that the husband is a parent if he provided sperm with the intent to be the parent of her child. UNIF. PARENTAGE ACT § 703 (2002), 9B U.L.A. 69 (Supp. 2011). Section 705(a) gives the husband whose sperm was used two years to show he did not consent to the assisted reproduction either before or after the birth of the child. § 705(a), 9B U.L.A. 71 (Supp. 2011).

87. Former CCP § 1826, as enacted 1872, currently CAL. FAM. CODE § 7540 (West 1994).

88. See, e.g., *Dantzig v. Biron*, 2008 Ohio App. LEXIS 180 (Jan. 18, 2008), in which a biological father sued a gestational carrier for paternity of a child conceived with the biological father’s sperm and an egg donated from an unnamed woman. The Ohio Court of Appeals affirmed the dismissal of his complaint for failing to join the natural mother (the egg donor) as a necessary party.

89. UNIF. PROBATE CODE § 2-120(b) (2011), 8 U.L.A. pt. I, at 57 (Supp. 2011); UNIF. PARENTAGE ACT § 702 (2002), 9B U.L.A. 355 (2001). The Model Act Governing Assisted Reproductive Technology, adopted by the American Bar Association Section on Family Law in 2008, concurs: Section 602 provides that “[a] donor is not a parent of a child conceived by means of assisted reproduction.” MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 602 (2008).

earlier legislation, both statutes cover all forms of assisted reproduction,⁹⁰ rather than just AI, and both cover all types of donated genetic material—sperm, ova, and preembryos⁹¹—rather than only sperm.

Once the donor is removed from the equation as a potential parent, the statutes then turn to the more difficult issue of who *is* the parent, particularly in cases in which a potential parent has neither a biological or genetic connection to the child. Both the UPC and the UPA establish a parent-child relationship between the child and the birth mother (who is not a gestational carrier), and provide ways for the birth mother's partner to be a parent, either through consent or through actions after the child's birth.⁹²

When both intended parents are alive, the UPA and the UPC work well. Because the UPA does not require written consent, someone who functioned as a parent within the child's first two years of life is considered the child's parent. The UPC has a similar, though not identical, provision. By not requiring written consent in all cases, but instead allowing parentage to be established through the actions of the persons involved in the child's life, both statutes strike an appropriate balance between strict legal requirements and reality. The statutes differ, however, on the evidence they require in order to establish consent when the child is conceived after an individual's death, the focus of the following section.

90. See UNIF. PROBATE CODE § 2-120(b) (2011), 8 U.L.A. pt. I, at 57 (Supp. 2011) ("A parent-child relationship does not exist between a child of assisted reproduction and a third-party donor."); accord UNIF. PARENTAGE ACT § 702 (2002), 9B U.L.A. 69 (Supp. 2011) ("A donor is not a parent of a child conceived by means of assisted reproduction."); cf. UNIF. PARENTAGE ACT § 5(b) (1973) (amended 2002), 9B U.L.A. 408 (2001) ("The donor of *semen* to a licensed physician for use in *artificial insemination*" is not the father of a child thereby conceived).

91. See UNIF. PARENTAGE ACT § 102(8) (2002), 9B U.L.A. 12 (Supp. 2011) ("Donor means an individual who produces eggs or sperm for assisted reproduction, whether or not for consideration."); accord, UNIF. PROBATE CODE § 2-120(a)(3) (2011), 8 U.L.A. pt. I, at 57 (Supp. 2011). The UPA originally only covered sperm donors in UNIF. PARENTAGE ACT § 5(b)(1973) (amended 2002), 9B U.L.A. 408 (2001).

92. See UNIF. PROBATE CODE § 2-120(f) (2011), 8 U.L.A. pt. I, at 58 (Supp. 2011) (requiring written consent, or that the individual "functioned as a parent no later than two years after the child's birth"); UNIF. PARENTAGE ACT § 704 (2002), 9B U.L.A. 69 (Supp. 2011) (requiring written consent or a finding that "the woman and man, during the first two years of the child's life resided together in the same household with the child and openly held out the child as their own").

*B. PMC Children: Should the Decedent Be Recognized As a Parent?
If So, How Should Consent to a PMC Child Be Established?*

Both the UPC and the UPA allow a decedent to be declared the parent of a child conceived years after the decedent's death.⁹³ The two statutes provide different mechanisms for determining parentage in this instance. The UPA requires an individual to state in writing that he or she consents to be the legal parent of a child conceived after that individual dies.⁹⁴ The UPC provides two additional ways to declare a decedent a legal parent in the absence of such written consent: by clear and convincing evidence of intent to parent a child conceived after the person's death, and through a presumption that arises if the decedent's surviving spouse has the child within a short time after the decedent's death.⁹⁵ A brief survey of existing state laws and cases on parentage of postmortem children demonstrates the need for legislation in this area, and the wisdom of the UPC approach over the UPA in resolving the problem.

Four states, by statute or decision, have determined that a traditional posthumous child (born within nine months of a man's death) can inherit, but a PMC child may not. Virginia law provides that any child born more than ten months after the death of a parent is not recognized as the child of that parent and cannot inherit in intestacy or by will.⁹⁶ Georgia amended its relevant statute in 2011 to preclude PMC children: the law provides that "[c]hildren of the decedent who are born after the decedent's death are considered children in being at the decedent's death, provided they were conceived prior to the decedent's death, were born within ten months of the decedent's death, and survived 120 hours or more after birth."⁹⁷ Courts in two states without statutes addressing PMC children, New Hampshire and Arkansas, have held that, under applicable state law, a PMC child cannot inherit from a decedent.⁹⁸ A fifth state, New York, allows a child born after the

93. UNIF. PARENTAGE ACT § 707 (2002), 9B U.L.A. 73 (Supp. 2011); UNIF. PROBATE CODE § 2-120(f) (2011), 8 U.L.A. pt. I, at 58 (Supp. 2011).

94. UNIF. PARENTAGE ACT § 707 (2002), 9B U.L.A. 73 (Supp. 2011).

95. UNIF. PROBATE CODE § 2-120(f)(2), (h)(2) (2011), 8 U.L.A. pt. I, at 58 (Supp. 2011).

96. See VA. CODE ANN. § 20-164 (2010). The Fourth Circuit referred to the Virginia statute to hold that a child born seven years after the genetic father's death was not eligible to inherit as his child and thus was ineligible for Social Security survivor benefits. See *Schafer v. Astrue*, 641 F.3d 49 (4th Cir. 2011).

97. GA. CODE ANN. § 53-2-1 (2011).

98. *Finley v. Astrue*, 270 S.W.3d 849 (Ark. 2008); *Khabbaz v. Comm'r, Soc. Sec. Admin.*, 930 A.2d 1180 (N.H. 2007). For a discussion of these cases, see Kristine S. Knaplund, *Legal Issues of Maternity and Inheritance for the Biotech Child of the 21st Century*, 43 REAL PROP. TR. &

execution of a testator's last will to claim a share if the child has been omitted from that will, but precludes a PMC child from making such a claim by requiring that the child be "born during the testator's lifetime or in gestation at the time of the testator's death and born thereafter." In these jurisdictions, enactment of either the UPA or the UPC would change existing law by allowing a PMC child to establish that the decedent was his or her parent, thus entitling the child to inherit.

Fourteen states⁹⁹ have enacted legislation to recognize the parentage of PMC children. Most of these states have followed the UPA model in requiring the decedent's written consent to the use of gametes after death.¹⁰⁰ Six states have enacted Section 707 of the 2000 UPA, which provides that a deceased spouse is not a parent of a PMC child unless the spouse, while alive, consented in writing.¹⁰¹ Another three states have adopted a later version of the UPA that applies to any individual, not only a spouse, who consents in writing to post-mortem conception.¹⁰²

A few states have enacted a UPA-UPC hybrid model or have designed a novel version to resolve the issue of parentage of PMC children. For example, California and Louisiana require written consent to be a parent of a PMC child (as in the UPA) and impose

EST. L.J. 393, 406–07 (2008). The Ninth Circuit, applying California law, has held that a PMC child was not the child of the decedent and could not inherit via intestacy under state law. *Vernoff v. Astrue*, 568 F.3d 1102 (9th Cir. 2009). California has since enacted a statute requiring written consent from the decedent and imposing time limits on when the PMC child can be born in order for the child to inherit. CAL. PROB. CODE § 249.5(a) (West 2011).

99. These states are Alabama, California, Colorado, Delaware, Florida, Iowa, Louisiana, Minnesota, North Dakota, New Mexico, Texas, Utah, Washington, and Wyoming. See *infra* notes 100–105.

100. See, e.g., ALA. CODE § 26-17-707 (2010) (requiring that a spouse sign the record and that the record be maintained by a licensed assisting physician); DEL. CODE ANN. tit. 13, § 8-707 (2010) (applying to any individual using assisted reproduction). The UPC as originally revised in 2004 by Professor Ronald Chester would also have required the decedent's written consent to be the parent of a PMC child. Ronald Chester, *Posthumously Conceived Heirs Under A Revised Uniform Probate Code*, 38 REAL PROP. PROB. & TR. J. 727, 729 (2004). Unlike the UPC, Professor Chester's version further required that the child live 120 hours or more after birth, that the decedent be the genetic parent of the child and have deposited the gametic material under circumstances in which parental rights were not terminated (i.e., not a donor), and that a complaint be filed in an appropriate court to determine the PMC child's status before final distribution of the decedent's estate and within three years of the decedent's death. *Id.*

101. See UNIF. PARENTAGE ACT § 707 (2002), 9B U.L.A. 73 (Supp. 2011); ALA. CODE § 26-17-707 (2010) (requiring that a spouse sign the record and that the record be maintained by a licensed assisting physician); COLO. REV. STAT. § 19-4-106(8) (2010); N.M. STAT. ANN. § 40-11A-707 (2011); TEX. FAM. CODE ANN. § 160.707 (West 2010) (requiring that the record be kept by a licensed physician); UTAH CODE ANN. § 78B-15-707 (LexisNexis 2008); WASH. REV. CODE ANN. § 26.26.730 (West 2011).

102. See DEL. CODE ANN. tit. 13, § 8-707 (2010); N.D. CENT. CODE § 14-20-65 (2010); WYO. STAT. ANN. § 14-2-907 (2010).

a timetable within which the sperm or eggs must be used to conceive a child (as in the UPC).¹⁰³ The most recent state to enact legislation on this issue, Iowa, crafted requirements that include written consent and a timetable.¹⁰⁴ Florida law accepts only one form of written consent to parent a PMC child: a will. Its statute provides that “[a] child conceived from the eggs or sperm of a person or persons who died before the transfer of their eggs, sperm, or preembryos to a woman’s body shall not be eligible for a claim against the decedent’s estate” unless the decedent’s will provided for the child.¹⁰⁵

The UPC rejects the requirement of written consent as too narrow, and allows consent to be demonstrated in other ways. The UPC is thus in accord with several court decisions that have struggled with the issue of determining parentage of a PMC child in the absence of express written consent. One of the first cases to consider inheritance rights of a postmortem conception child, *Woodward v. Commissioner of Social Security* (decided in 2002), did not require express written consent by the decedent.¹⁰⁶ Instead, the Massachusetts Supreme Judicial Court required proof that “the decedent affirmatively consented to posthumous conception and

103. See CAL. PROB. CODE § 249.5(a) (West 2011); LA. REV. STAT. ANN. § 9:391.1(A) (2010).

104. The Iowa statute requires that the parents must have gone through a marriage ceremony or common law marriage not thereafter dissolved, that the decedent is the child’s genetic parent, and the child is born within two years of the decedent’s death. IOWA CODE § 252A.3 (2011). If these requirements are met, the PMC child can take in intestacy, § 633.220A, as a child omitted from the decedent’s will, § 633.267, and as a child born after the execution of a revocable inter vivos trust, § 633A.3016. The statute is not retroactive for children conceived before the law’s effective date. See *Beeler v. Astrue*, 651 F.3d 954, 966 n.4 (8th Cir. 2011). For an analysis of the legal implications of the *Beeler* decision, see Kristine S. Knaplund, *Will the U.S. Supreme Court Resolve the Issue of “Who Is a Decedent’s Child?”*, ABA REAL PROPERTY, TRUSTS AND ESTATES REPORT (Dec. 2011), available at http://www.americanbar.org/content/newsletter/publications/rpte_e_report_home/rpte_ereport_december2011.html.

105. FLA. STAT. ANN. § 742.17(4) (West 2011). Absent that provision in a will, a PMC child is ineligible to inherit via intestacy under Florida law and thus might not be entitled to Social Security benefits as the decedent’s child. *Stephen v. Comm’r of Soc. Sec.*, 386 F. Supp. 2d 1257, 1265 (M.D. Fla. 2005). *Contra Capato v. Astrue*, 631 F.3d 626 (3d Cir. 2011), *rev’d*, *Astrue v. Capato*, 565 U.S. ____ (2012).

106. 760 N.E.2d 257, 270–71 (Mass. 2002). The first case to hold that a PMC child could inherit in intestacy from a decedent did not consider the issue of the decedent’s consent. In *Estate of Kolacy*, the court held that “once we establish, as we have in this case, that a child is indeed the offspring of a decedent, we should routinely grant that child the legal status of being an heir of the decedent, unless doing so would unfairly intrude on the rights of other persons or would cause serious problems in terms of the orderly administration of estates.” 753 A.2d 1257, 1262 (N.J. 2000).

to the support of any resulting child.”¹⁰⁷ The court was silent on how consent could be established.¹⁰⁸

In *Vernoff v. Astrue*, the Ninth Circuit affirmed the holdings in *Woodward* and a previous Ninth Circuit case, *Gillett-Netting v. Barnhart*,¹⁰⁹ noting, “The courts’ reliance on the decedent’s consent to the posthumous conception, as a basis for establishing natural parenthood, was central to the holdings in both *Gillett-Netting* and in *Woodward v. Commissioner of Social Security*”¹¹⁰ In the absence of statutory guidance, the Ninth Circuit in *Gillett-Netting* considered evidence such as Netting’s oral statements that he wanted his wife to use his sperm after his death to conceive a child, and thus held that the decedent had consented to be a parent of a PMC child without insisting on a written record, as required by the UPA.¹¹¹ In *Vernoff*, the Ninth Circuit held that consent to parent a PMC child was lacking, as the sperm was obtained after the decedent’s death with no evidence of his consent.¹¹²

Requiring written consent most accurately ensures that a person who participates in ART does so with the intent to be a parent.¹¹³ At the same time, it excludes many who did not commit their intent to writing. As Professor Joslin argues, while “the parties should be encouraged to enter into written consents . . . a child should not be denied financial and emotional protections just because the adults failed to comply with some legal formality.”¹¹⁴ The couple in *Gillett-Netting* illustrates this concern.¹¹⁵ The husband Netting had been diagnosed with cancer in December 1994 while he and his wife, Gillett-Netting, were attempting to conceive.¹¹⁶ He delayed chemotherapy treatments that would render him sterile in order to deposit his sperm for later use. He “confirmed that he wanted Gillett-Netting to have their child after his death using his frozen sperm,” and died shortly thereafter in February 1995.¹¹⁷ Under many state statutes, without his written consent, the two children born using his frozen sperm would not be his legal children and thus would not be entitled to inherit in intestacy.

107. *Woodward*, 760 N.E.2d at 259.

108. *Id.* at 270–71.

109. 371 F.3d 595 (9th Cir. 2004).

110. *Vernoff v. Astrue*, 568 F.3d 1102, 1109 (9th Cir. 2009).

111. *See Gillett-Netting*, 371 F.3d at 595, 596.

112. *See Vernoff*, 568 F.3d at 1104.

113. *See, e.g., In re K.M.H.*, 169 P.3d 1025 (Kan. 2007) (upholding a Kansas statute that required a written agreement that a sperm donor would be a parent).

114. Courtney G. Joslin, *Protecting Children(?): Marriage, Gender and Assisted Reproductive Technology*, 83 S. CAL. L. REV. 1177, 1226 (2010).

115. *See Gillett-Netting*, 371 F.3d at 594–95.

116. *Id.* at 594.

117. *Id.*

The UPC would recognize Netting as the legal parent in the absence of a signed record if he “intended to be treated as a parent of a posthumously conceived child if that intent is established by clear and convincing evidence.”¹¹⁸ In Netting’s case, depositing sperm shortly before his death, and his statements to his wife and others on using gametes after his death, evidence his intent.¹¹⁹ If the UPC contained only these provisions, the statute would strike an appropriate balance between protecting an individual’s interest in controlling his or her gametes after death and allowing parentage to be established through clear and convincing evidence in the absence of written consent. The UPC does *not* stop at this point, however: it includes an extraordinarily broad presumption of consent for a married person if his or her spouse is the birth mother within the time limits of the UPC.¹²⁰ Unlike the comparable presumption for a married decedent when a gestational carrier is used,¹²¹ the presumption in Section 2-120 does not require an individual to deposit his or her gametes before death. A surviving spouse could benefit from the presumption even if the gametes were retrieved from the decedent after death and without his or her consent. The burden would be on the opposing party to show by clear and convincing evidence that consent to parent a PMC child was absent. Thus, the UPC’s presumption of consent for a decedent who is married at the time of death allows for, and arguably encourages, the postmortem retrieval of gametes from the cadaver. The ethical implications of encouraging postmortem retrieval of sperm or ova constitute important policy considerations in the decision whether to enact the UPC.

*C. Encouraging Postmortem Retrieval of Gametes in
the Absence of Consent Is Unethical*

The UPC amendments provide three ways for a decedent to be declared the parent of a PMC child: through a signed record,

118. UNIF. PROBATE CODE § 2-120(f)(2)(C) (2011), 8 U.L.A. pt. I, at 58 (Supp. 2011).

119. See *Gillett-Netting*, 371 F.3d at 594–95.

120. See UNIF. PROBATE CODE § 2-120(h)(2) (2011), 8 U.L.A. pt. I, at 58 (Supp. 2011) (“If the birth mother is a surviving spouse and at her deceased spouse’s death no divorce proceedings were then pending, then, in the absence of clear and convincing evidence to the contrary, her deceased spouse is deemed to have satisfied subsection (f)(2)(B) [requiring that the individual intended to function as a parent of the child no later than two years after the child’s birth but was prevented from carrying out that intent by death, incapacity, or other circumstances] or (C) [intended to be treated as a parent of a posthumously conceived child if that intent is established by clear and convincing evidence].”).

121. § 2-121(f), 8 U.L.A. pt. I, at 58 (Supp. 2011).

proof of intent to function as a parent, or proof of intent to be treated as a parent.¹²² The “intended to function as a parent” test works well when an unmarried couple has started ART and the woman is pregnant when her partner dies. A typical example is a partner who has accompanied the woman to the clinic consistently but has not executed written consent to be a parent. Under the UPA, the partner would not be a parent of the child even if the partner’s gametes had been used, because the UPA requirements of either written consent or “holding out the child as one’s own” have not been satisfied. The UPC’s more onerous standard of “clear and convincing evidence” for a PMC child further protects the decedent while offering an opportunity to prove such consent in the absence of a writing.

The application of the UPC amendments is problematic when a decedent leaves a spouse who later becomes the birth mother of a PMC child. In this case, as long as no divorce proceedings were pending when the decedent died, the decedent is presumed to have consented to be the parent of the PMC child in the absence of clear and convincing evidence to the contrary. This presumption applies even if donated gametes, and not the decedent’s gametes, are used to conceive the child, or if the decedent’s gametes are harvested after death, a procedure medically possible for both sperm and ova. Sperm can be harvested up to forty-eight hours after brain death, but is generally retrieved within twenty-four to thirty-six hours of death.¹²³ While it is theoretically possible to retrieve ova after a woman’s death, no successful attempt has yet been documented in the United States.¹²⁴

Encouraging the postmortem retrieval of gametes without the deceased spouse’s consent is unethical and may violate a right to bodily integrity or procreative liberty. Even if no such rights exist, the practice should be discouraged on public policy grounds.

In cases where the decedent expressed consent to postmortem harvesting of gametes, no argument of a violation of bodily integri-

122. See § 2-120(f)(1)–(2), 8 U.L.A. pt. I, at 58 (Supp. 2011); see also discussion *supra* notes 64–67 and accompanying text.

123. See NORMAN L. CANTOR, *AFTER WE DIE: THE LIFE AND TIMES OF THE HUMAN CADAVER* 20–21, 212 (2010). Ideally, sperm is retrieved as quickly as possible after death, since sperm motility and viability begin to progressively decline within three hours of death. See Jennifer Tash et al., *Postmortem Sperm Retrieval: The Effect of Instituting Guidelines*, 170 J. UROLOGY 1922, 1923 (2003).

124. See Jason D. Hans, *Attitudes Toward Posthumous Harvesting and Reproduction*, 32 DEATH STUD. 837, 839 (2008) (stating that there are no published reports of postmortem retrieval of ova); David M. Greer, et al., *Case 21-2010: A Request for Retrieval of Oocytes from a 36-Year-Old Woman with Anoxic Brain Injury*, 363 NEW ENG. J. MED. 276 (2010); Michael R. Soules, *Commentary, Posthumous Harvesting of Gametes: A Physician’s Perspective*, 27 J.L. MED. & ETHICS 362, 365 (1999).

ty arises.¹²⁵ The situation is, in some ways, analogous to organ donation: if a person has signed valid directives indicating her wish that her organs or tissue be used after her death, then no harm comes to her by carrying out her wishes. If she hasn't stated any preference as to organ donation, her family members might consent on her behalf. Even though obtaining her organs for transplant is highly invasive, hospitals routinely harvest such organs with only the family's consent.¹²⁶

Like organ donation, harvesting sperm or ova after death can be highly intrusive. Doctors obtain sperm through electroejaculation,¹²⁷ or the surgical removal of the testes (orchietomy).¹²⁸ Minimally invasive techniques are also used, such as vasal aspiration, in which an incision is made in the vas deferens in order to insert a catheter and obtain the sperm.¹²⁹ Postmortem retrieval of ova requires a surgeon to remove the ovaries in order to obtain the ova.¹³⁰

While alive, a person has the right to refuse to donate her organs or gametic material. The United States Supreme Court has held that "[t]he integrity of an individual's person is a cherished

125. Such premortem authorization, however, "is not likely to occur." Tash et al., *supra* note 123, at 1923.

126. Indeed, some hospitals will only proceed with the family's consent, despite the decedent's directive. The 1987 Uniform Anatomical Gift Act (UAGA) made clear that a decedent's donation is valid and "does not require family concurrence," UNIF. ANATOMICAL GIFT ACT § 2(h) (1987), while the 2006 UAGA states that "[t]he decedent's wish for or against donation is not subject to change by others," *id.* UNIF. ANATOMICAL GIFT ACT § 8(a) (2006). Still, in practice, the hospital may refuse to proceed if the family objects. As the Official Commentary to the 2006 revision of the UAGA noted,

While the 1987 [Uniform Anatomical Gift] Act provided that a donor's anatomical gift was irrevocable (except by the donor), until quite recently it had been a common practice for procurement organizations to seek affirmation of the gift from the donor's family. This could result in . . . a reversal of a donor's donating decision.

UNIF. ANATOMICAL GIFT ACT, Prefatory Note (2006).

127. See Townsend et al., *Artificially Stimulated Ejaculation in the Brain-Dead Patient: A Case Report*, 47 J. UROLOGY 760 (1996). In electroejaculation, "a well-lubricated large rectal probe with horizontal electrode plates is introduced gently into the rectal ampulla Electrostimulation via rectal probe may then begin." *Electroejaculation*, CORNELL MED. COLL. DEP'T OF UROLOGY, <https://www.cornellurology.com/clinical-conditions/male-infertility/sperm-retrieval-techniques/electroejaculation/> (last visited Feb. 24, 2012).

128. See Swinn et al., *Retrieving Semen From a Dead Patient: Utilitarianism in the Absence of Definitive Guidelines*, 317 BMJ 1583 (1998). Orchietomy is the surgical removal of one or both testicles.

129. See Tash et al., *supra* note 123, at 1925.

130. Cf. Lisa V. Brock & Anna C. Mastroianni, *Sperm and Egg Retrieval for Posthumous Reproduction: Practical, Ethical and Legal Considerations*, in OFFICE ANDROLOGY 267, 271 (2005).

value of our society,"¹³¹ thus limiting the Government's right, for example, to force a person to submit to a blood test.¹³² Similarly, the California Court of Appeal has upheld a person's right to sue to remove a nasogastric tube inserted over her express instructions, even though such removal could result in her death.¹³³

Legislatures have allowed a dead person certain rights to protect bodily integrity, such as laws that enforce a person's instructions on disposition of his body after death, including donations of his organs.¹³⁴ In other contexts, however, the right to control the disposition of the body is a right given to the decedent's family, not to the decedent herself. If a cadaver is mishandled, for example, the family may sue for a taking of their property without due process of law.¹³⁵ Some courts have described a person's "right to be buried,"¹³⁶ but even this right belongs to the family, not the decedent: the courts discuss which living person determines where and how the burial will take place. As the Supreme Court of Rhode Island observed in a dispute between a widow and the decedent's only child over removing of the decedent's body to another cemetery:

Now, strictly speaking, according to the strict rules of the old common law, a dead man cannot be said to have rights. Yet it is common so to speak, and the very fact of the common use of such language, and of its being used in such cases as we have quoted, justifies us in speaking of it as a right in a certain qualified sense, and a right that ought to be protected And a sort of right of custody over, or interest in the dead body, in the relatives of the deceased, is recognized in the statutes of many of our states.¹³⁷

131. *Schmerber v. California*, 384 U.S. 757, 772 (1966); *see also* *Sell v. U.S.*, 539 U.S. 166, 169 (2003) (regarding "whether the Constitution permits the Government to administer antipsychotic drugs involuntarily to a mentally ill criminal defendant—in order to render that defendant competent to stand trial for serious, but nonviolent crimes.")

132. *See Schmerber*, 384 U.S. at 772.

133. *Bouvia v. Superior Court*, 179 Cal. App. 3d 1127, 1136 (1986).

134. *See, e.g.*, UNIF. ANATOMICAL GIFT ACT § 8(a) (2006).

135. *See, e.g.*, *Newman v. Sathyavaglswaran*, 287 F.3d 786 (9th Cir. 2002) (describing how the parents of deceased children whose corneas were removed by the coroner's office without the parents' notice or consent brought an action pursuant to 42 U.S.C. Section 1983 alleging "a taking of *their* [the parents'] property without due process of law"); *accord* *Whaley v. County of Tuscola*, 58 F.3d 1111 (6th Cir. 1995); *Brotherton v. Cleveland*, 923 F.2d 477 (6th Cir. 1991).

136. *See, e.g.*, *Pierce v. Proprietors of Swan Point Cemetery*, 10 R.I. 227, 238–39 (1872); *accord In re Johnson's Estate*, 7 N.Y.S.2d 81, 84 (Sur. Ct. 1938).

137. *Pierce*, 10 R.I. at 239 (citations omitted).

Overall, an assertion that a cadaver has a right to bodily integrity, and thus a cause of action if his or her gametes are retrieved without premortem consent, is tenuous at best. No court has found such a right to survive one's death. By analogy to organ donation, the decedent's family would likely be allowed to consent to retrieval, at least in cases in which the decedent had not affirmatively denied consent. A more promising argument, and one that has support from some scholars, is the proposition that a person has a right to refuse to produce a child after his death. Even though the degree of physical intrusiveness in the harvesting of gametes postmortem may be analogous to organ donations,¹³⁸ the two procedures have very different outcomes.

A key difference between retrieving sperm and harvesting a liver is that only in the first case will the sperm result in a child with the decedent's DNA.¹³⁹ A second difference is that organs are transplanted to benefit a specific recipient¹⁴⁰ while postmortem sperm retrieval does not.

Should written consent be required, as the UPA provides, to protect some right of procreative liberty of the decedent? When gametes are retrieved postmortem, uncertainty often arises regarding whether the decedent consented to be a parent. Harm occurs when one has not consented to be a parent. Some scholars advocate for a constitutional right to avoid procreation.¹⁴¹ Professor Cohen has argued for the right not to be a genetic parent by examining the type of harm that occurs when one has not consented. He notes that "it is not merely the existence of someone who carries my genetic code, but the attribution of parenthood, that is the harm."¹⁴² If a living person is considered a parent by society, by the child, or by the person himself, that attribution can cause harm through damage to the parent's reputation, economic consequences, and other harms.

138. The Sixth District Iowa court implied consent for postmortem sperm retrieval from the fact that the decedent had consented to be an organ donor under Iowa's version of the Uniform Anatomical Gift Act. See Bethany Spielman, *Post Mortem Gamete Retrieval After Christy*, 5 ABA HEALTH eSOURCE 2 (2008), www.americanbar.org/content/newsletter/publications/aba_health_esource_home/Volume5_02_spielman.html (citing *In re Daniel Thomas Christy*, Case No. EQVO68545 (Sept. 14, 2007)).

139. See Hans, *supra* note 124, at 841 ("Although some issues overlap, there is a clear distinction between anatomical gifts that are life-sustaining and those that are life-creating."); accord Brock & Mastroianni, *supra* note 130, at 274.

140. See Tash et al., *supra* note 123, at 1924. Of course, postmortem gamete retrieval can result in a benefit to the resulting child, who otherwise would never have been born.

141. See Russell Korobkin, *Autonomy and Informed Consent in Nontherapeutic Biomedical Research*, 54 UCLA L. REV. 605, 626 (2007). But see I. Glenn Cohen, *The Constitution and the Rights Not To Procreate*, 60 STAN. L. REV. 1135, 1195 (2008) (challenging such a constitutional right, at least as to genetic parentage).

142. Cohen, *supra* note 22 at 1137.

If the parent is deceased, the decedent cannot *feel* any harm. Nevertheless, the decedent's estate may be burdened by the decision that he is the *legal* parent of the resulting child. While the decedent will never pay child support, the decedent's estate may be obligated to provide for that child as an intestate or pretermitted heir.¹⁴³ In fact, the harm to the decedent may be greater than to a living person, because the decedent cannot avoid these claims against his estate. In all but one state, if a parent were alive when the unconsented-to legal parentage occurred, she could execute a will intentionally omitting this child.¹⁴⁴ This option, of course, dies with the decedent.

Aside from the arguable existence of a right to bodily integrity or a right not to procreate that survives the individual, the policy matter remains: should a statute such as UPC Section 2-120 encourage the retrieval of gametes from a cadaver without consent? The Ethics Committee of the American Society for Reproductive Medicine issued a report on posthumous reproduction in 2004 that recommended that "[a] spouse's request that sperm or ova be obtained terminally or soon after death without the prior consent or known wishes of the deceased spouse need not be honored,"¹⁴⁵ but did not ban the practice. Retrievals without consent have been reported.¹⁴⁶ Even if a cadaver has no right to bodily integrity, the decedent's body is entitled to dignity and respect,¹⁴⁷ as evidenced by a wide array of laws beyond those concerning procreation. For example, laws prohibit necrophilia and the desecration of a corpse, not be-

143. Cf. *id.* at 1127 ("The harm posed by unconsented-to legal parenthood is also fairly tangle: it consists of the obligation to pay support for the child as well as any other obligations of a legal parent.").

144. The exception is Louisiana, which requires a parent to provide for a minor child or a disabled adult child. See DUKEMINIER, SITKOFF & LINDGREN, WILLS, TRUSTS, AND ESTATES 521 (8th ed. 2000) (citing LA. CONST. art. 12, § 5; LA. CIV. CODE ANN. § 1493).

145. Ethics Comm. Of the Am. Soc'y for Reprod. Med., *Posthumous Reproduction*, 82 FERTILITY & STERILITY 260, 261 (2004).

146. See Hans, *supra* note 124, at 838 (citing studies in which gametes were harvested without consent of the donor for postmortem use). Also see *Vernoff v. Astrue*, 568 F.3d 1102, 1105 (9th Cir. 2009), in which Bruce Vernoff's sperm was retrieved postmortem with "no evidence to suggest that Bruce consented to the procedure or had ever contemplated having a child postmortem." The Ninth Circuit held that Vernoff was not the legal parent of the PMC child because California law considers the intent to create and willingness to support a child in determining parentage. *Id.* at 1109–10. In *Stephen v. Barnhart*, 386 F. Supp. 2d 1257, 1259 (M.D. Fl. 2005), also a case involving a postmortem conception child seeking Social Security survivor benefits, the decedent's sperm was retrieved postmortem, but the record is silent as to decedent's consent to the procedure.

147. See *Newman v. Sathyavaglswaran*, 287 F.3d 786, 790–92 (9th Cir. 2002) for a history of common law interests in dead bodies.

cause the cadaver has rights, but because of the message such acts impart about our culture.¹⁴⁸

Respecting a person's bodily integrity after her death can similarly show respect for that person. Statutes allow a family to consent to organ donation in the absence of the decedent's consent while living because of the societal benefit to the living, and because the decedent suffers no harm. Because the potential consequences of gamete retrieval include parenthood, the decedent's estate may suffer an economic harm, and thus the decedent's consent *to be a parent* should always be required. As Professor Cantor comments, "It is harmful to molest a cadaver in this way unless one can reasonably infer that the decedent would have wanted his sperm to be retrieved."¹⁴⁹ To avoid encouraging postmortem retrieval without consent, the UPC should be amended so that the presumption of consent to reproduce after death would arise only if the decedent had deposited the gametes pre-mortem.

D. Should Statutes Include Unmarried Couples and Single Parents?

In order to be relevant to the population that is using ART, it is critical to extend statutes to unmarried and single parents. A large percentage of babies are born to unmarried women. Both the 2002 UPA and the 2008 UPC amendments determine parentage of a child born to unwed parents,¹⁵⁰ but only the UPC includes same-sex couples and single parents within its scope.¹⁵¹

A 2007 survey by the Pew Research Center found that 37 percent of births in the United States in 2005 were to unmarried women, up from 5 percent in 1960.¹⁵² The 2009 CDC National Summary reports that 95 percent of ART clinics offer their services to single women.¹⁵³ California Cryobank, the world's largest sperm bank, reported in 2007 that over 30 percent of its clients were single women.¹⁵⁴ Single women combined with lesbian couples totaled 60

148. See generally Tyler Trent Ochoa & Christine Newman Jones, *Defiling the Dead: Necrophilia and the Law*, 18 WHITTIER L. REV. 539 (1997). The criminalization of necrophilia is "based primarily on [our culture's] widespread horror at corpse desecration." *Id.* at 542-43.

149. CANTOR, *supra* note 123, at 222.

150. See *supra* notes 42-47 and accompanying text.

151. See *supra* notes 55-59 and accompanying text.

152. PEW RESEARCH CENTER, AS MARRIAGE AND PARENTHOOD DRIFT APART, PUBLIC IS CONCERNED ABOUT SOCIAL IMPACT 3 (Jul. 1, 2007), <http://www.pewsocialtrends.org/files/2007/07/Pew-Marriage-report-6-28-for-web-display.pdf>.

153. ART NATIONAL SUMMARY REPORT, *supra* note 26.

154. *Choosing Single Motherhood: Driving Trend in Out-Of Wedlock Births*, CALIF. CRYOBANK (July 6, 2007), <http://www.cryobank.com/About-us/Press-Releases/template.cfm?id=1266>.

percent of clients; only 40 percent were heterosexual couples.¹⁵⁵ Ten years earlier, approximately 80 percent of the sperm bank's clients were married couples.¹⁵⁶ Gay and lesbian couples are also using ART to have children.¹⁵⁷ Including unmarried women and same-sex couples in the statutory provisions is increasingly important to establishing parentage for thousands of children.

The UPC's inclusion of same-sex couples and single persons could signal a change from existing state law and the UPA regarding same-sex marriage and procreation. Professor Tritt has argued, "Such recognition would manifest a drastic shift in policy in states that do not allow gay marriage, civil unions, or second-parent adoption."¹⁵⁸ On family issues other than same-sex marriage or ART, however, the UPC's gender-neutral language would be consistent with many states' policies on adoption and foster care. Almost all states allow single persons and people who are gay and lesbian to be foster parents¹⁵⁹ and adopt,¹⁶⁰ but a number of states

155. *Id.*

156. *Id.* For similar stories about single mothers and sperm donation, see Amy Harmon, *First Comes the Baby Carriage*, N.Y. TIMES, Oct. 13, 2005, at G1; Lorie A. Patch, *With No Mr. Right in Sight, Time for Plan B: More Women are Silencing Their Biological Clocks via Sperm Donation*, MSNBC.COM (July 14, 2005, 9:14 AM), <http://www.msnbc.msn.com/id/8284173/ns/health-pregnancy/t/no-mr-right-sight-time-plan-b/#.T0j4IszFSPQ>. For cites to newspaper accounts reporting that 1/3 of all AID consumers are unmarried women, see Judith F. Daar, *Accessing Reproductive Technologies: Invisible Barriers, Indelible Harms*, 23 BERKELEY J. GENDER L. & JUST. 18, 25 (2008).

157. A 2002 report by the American Academy of Pediatrics estimated that "between 1 and 9 million children in the United States have at least 1 parent who is lesbian or gay." Ellen C. Perrin, et al., *Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 PEDIATRICS 341, 341 (2002). While many of these children were conceived in heterosexual relationships, some gay and lesbian couples are using ART to conceive children. For examples of recent news reports on the "Gayby boom," see Cynthia Leonor Garza, "Gayby Boom" in Houston: City a Favorite Spot for Gays and Lesbians to Raise Families, HOUSTON CHRONICLE, Oct. 15, 2006, at B1; Scott Harris, *Gay Parents Give Birth to Families of Their Own, Thanks to Such Methods as Artificial Insemination and Adoption*, L.A. TIMES, Oct. 20, 1991, at A1; Kay Harvey, *More Gay, Lesbian Couples Starting Families*, TIMES-PICAYUNE (New Orleans), Apr. 4, 1999, at B4, available at Factiva, Doc. No. tp000020010828dv4400heh; Dan Savage, *Why We're Returning This Summer to Gay Family Camp in Michigan*, CHICAGO TRIBUNE, July 1, 2005, at C1; John Blake, "Gayby Boom": Children of Gay Couples Speak Out, CNN (June 24, 2009), http://articles.cnn.com/2009-06-24/living/gayby_1_same-sex-couples-lesbian-parents?_s=PM:LIVING.

158. Lee-Ford Tritt, *Technical Correction or Tectonic Shift: Competing Default Rule Theories Under the New UPC*, 61 ALA. L. REV. 273, 316 (2010).

159. *But see* Gary J. Gates, M.V. Lee Badgett, Jennifer Ehrle Macomber & Kate Chambers, *Adoption and Foster Care by Gay and Lesbian Parents in the United States*, California Center for Population Research, UCLA 3 (Dec. 2007), <http://escholarship.org/uc/item/3484484b> (referencing UTAH CODE ANN. § 62A-4A-602 (LexisNexis 2008) (cohabitating couples who are not married under Utah law cannot become foster parents or adopt) and explaining that Nebraska may also prohibit gay people from fostering children, although currently the enforcement policy is unclear).

160. Mississippi prohibits "adoption by couples of the same gender." *See* MISS. CODE ANN. § 93-17-3(5) (2011). Utah prohibits adoptions by "a person who is cohabiting in a relationship that is not a legally valid and binding marriage under the laws of this state." UTAH

discourage the use of ART by anyone other than heterosexual married couples. An Oklahoma statute authorizes only married couples to use assisted insemination (AI).¹⁶¹ Many state statutes clarify the parentage of ART children only in cases where the child's parents are married.¹⁶² That leaves many ART children in limbo, being raised by adults who function as their parents but are not legally recognized. As Professor Joslin has observed:

Despite the fact that the evidence suggests that a significant number of women making use of alternative insemination are unmarried, only four states—Delaware, New Mexico, North Dakota, and Wyoming—and the District of Columbia have statutes that by their literal terms apply to children born to unmarried couples In sum, children born to unmarried couples through alternative insemination remain excluded from the statutory and common law provisions in the vast majority of states.¹⁶³

In addition to the AI statutes, some states have enacted laws declaring that only those gestational surrogacy contracts entered into by married couples are enforceable. Florida, for example, provides

CODE ANN. § 78B-6-117(3)(b) (LexisNexis 2008). FLA. STAT. § 63.042(3) (2006) states that a homosexual is not eligible to adopt, but a Florida court has held that the ban violated the equal protection clause of the Florida constitution. See Fla. Dep't of Children & Families v. X.X.G., 45 So. 3d 79, 81 (Fla. Ct. App. 2010). In 2008, Arkansas voters passed Initiative Act 1, which prohibited unmarried cohabitants from being foster or adoptive parents, but the law was held to violate the Arkansas constitution in *Arkansas Dept. of Human Services v. Cole*, 2011 Ark. 145 (Apr. 7, 2011). For a survey of state laws governing adoption, see National Center for Lesbian Rights, *Adoption by Lesbian, Gay, and Bisexual Parents: An Overview of Current Law*, NATIONAL CENTER FOR LESBIAN RIGHTS, available at <http://www.nclrights.org/site/DocServer/adptn0204.pdf?docID=1221> (last visited Feb. 25, 2012); see also Am. Soc'y for Reprod. Med., *Access To Fertility Treatment by Gays, Lesbians and Unmarried Persons*, 92 FERTILITY & STERILITY, 1190, 1191 (2009).

161. See OKLA. STAT. ANN. tit. 10, § 553 (West 2011) (authorizing doctors to perform artificial insemination only with permission of husband and wife).

162. These include statutes modeled on the 1973 Uniform Parentage Act, which provided that a husband who consented to the artificial insemination of his wife was the father of the resulting child, but were silent on parentage for unmarried couples, see, e.g., MO. REV. STAT. § 210.824 (2000); NEV. REV. STAT. § 126.061 (2011); N.J. STAT. ANN. § 9:17-44 (West 2002), but even more recent statutes covering egg donation deal only with married couples, e.g., OKLA. STAT. ANN. tit. 10 § 554 (2009) ("Any child or children born as a result of a heterologous oocyte donation shall be considered for all legal intents and purposes, the same as a naturally conceived legitimate child of the husband and wife which consent to and receive an oocyte pursuant to the technique of heterologous oocyte donation."). For a discussion of these statutes and their effects on single women, see Richard F. Storrow, *Rescuing Children from the Marriage Movement: The Case Against Marital Status Discrimination in Adoption and Assisted Reproduction*, 39 U.C. DAVIS L. REV. 305, 310-13 (2006).

163. Courtney G. Joslin, *Protecting Children(?): Marriage, Gender and Assisted Reproductive Technology*, 83 S. CAL. L. REV. 1177, 1186-187 (2010) (footnotes omitted).

that “[a] contract for gestational surrogacy shall not be binding and enforceable unless . . . the commissioning couple are legally married and are both 18 years of age or older.”¹⁶⁴ Texas and Utah have similar laws authorizing gestational agreements on the condition, *inter alia*, that “[t]he intended parents must be married to each other,”¹⁶⁵ but neither state will recognize the marriage of two men performed legally in another state.¹⁶⁶ For such a married couple,¹⁶⁷ this refusal to allow the use of ART or to enforce their gestational agreement could implicate a right to procreate suggested by the United States Supreme Court’s decisions in such cases as *Griswold v. Connecticut*.¹⁶⁸ Using a gestational carrier is the only means by which a gay couple can have a child. If the purpose of marriage is to have and raise children, as some have argued in the debate over same-sex marriage,¹⁶⁹ this provides a compelling reason to include married gay couples in these statutes. A right to procreate protects the creation of children, not the specific heterosexual conduct that leads to them. As Professor Robertson has argued, “beliefs about the importance of having offspring are so important that coital reproduction by married couples is constitutionally protected But if that point is so, then noncoital

164. FLA. STAT. ANN. § 742.15(1) (2010). Six states have similar statutes: NEV. REV. STAT. § 126.045 (2011); N.H. REV. STAT. ANN. § 168-B:21 (2002); UTAH CODE ANN. § 78B-15-801 (LexisNexis 2008); VA. CODE ANN. § 20-156 (2008).

165. TEX. FAM. CODE § 160.754(b) (West 2010); *accord* UTAH CODE ANN. § 78B-15-801(3).

166. TEX. FAM. CODE § 160.754(b) (West 2010); UTAH CONST. art I, § 29.

167. Seven states issue marriage licenses to same-sex couples: Massachusetts, Connecticut, Iowa, Vermont, New Hampshire and New York, plus the District of Columbia. *Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Laws*, NAT’L CONF. OF STATE LEGISLATURES, <http://www.ncsl.org/issues-research/human-services/same-sex-marriage-overview.aspx> (last updated Feb. 24, 2012). Although California does not currently allow same-sex marriage, the Ninth Circuit Court of Appeals found that the state constitution’s restriction on same-sex marriage was invalid. This decision will not take effect, however, until it is decided on appeal. *Id.*

168. *Griswold v. Connecticut*, 381 U.S. 479 (1965) (ban on sale of contraception to married couple violated right of privacy).

169. See, e.g., Jeffery J. Ventrella, *Square Circles!!! Restoring Rationality to the Same-Sex “Marriage” Debate*, 32 HASTINGS CONST. L.Q. 681, 702–06 (2005) (providing that “[c]ourts have always recognized that the relationship between procreation and marriage is the reason for State protection of the institution” and citing cases); Amy L. Wax, Op-Ed *Promoting the Ideal of Procreation*, N.Y. TIMES (Aug. 4, 2010, 11:45 PM), <http://www.nytimes.com/roomfordebate/2010/08/04/gay-marriage-and-the-constitution/promoting-the-ideal-of-procreation> (“The privileged place accorded marriage between a man and a woman represents the law’s attempt to recognize the unique value of the ideal family—mother, father, child—and to encourage its formation.”). *But see* John Robertson, *Gay and Lesbian Access to Assisted Reproductive Technology*, 55 CASE W. RES. L. REV. 323, 342–45 (2004) (refuting such arguments); Am. Soc’y for Reprod. Med., *supra* note 160, at 1190 (“Neither concerns about the welfare of children nor the desire to promote marriage justify denying reproductive services to unmarried individuals or couples, including those who are gay or lesbian.”).

reproduction should also be presumptively protected because it involves conduct that arrives at the same results that coital reproduction does.”¹⁷⁰ While Professor Robertson argues that only married couples should have this right to procreate using ART, the U.S. Supreme Court has not limited the right of privacy to married couples, concluding that “it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”¹⁷¹ Unlike the statute in *Eisenstadt v. Baird*, which criminalized providing contraceptives to unmarried persons, most state statutes allow single, gay, and lesbian persons to use ART to have children, but penalize them by failing to provide the same clear rules for parentage as given to married couples. These statutes should determine parentage for everyone using ART, whether married or not. Some scholars have argued that statutes that explicitly limit certain ARTs to married couples infringe on the right of privacy of unmarried persons found in cases such as *Skinner*¹⁷² and *Eisenstadt*.¹⁷³ Professor Daar, for example, argues that such statutes “pose an undue burden on the rights of unmarried persons to procreate.”¹⁷⁴ Laws that restrict ART to married couples¹⁷⁵ are reminiscent of old statutes that sought to discourage out-of-wedlock children by refusing to allow these children to inherit.¹⁷⁶ Centuries of discrimination against illegitimate children were finally overcome with “a transformation of the law of illegitimacy in the United States [that] followed the world-wide pattern of

170. John A. Robertson, *Liberalism and The Limits of Procreative Liberty: A Response To My Critics*, 52 WASH. & LEE L. REV. 233, 246 (1995).

171. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (referring to the decision in *Griswold* that struck down a Massachusetts statute prohibiting the distribution of contraceptives to unmarried couples); see also *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

172. 316 U.S. 535 (1942). The U.S. Supreme Court held that an Oklahoma statute that required sterilization of repeat offenders who committed larceny, but not embezzlement, violated the equal protection clause of the 14th Amendment by forever depriving the convicted felon of “one of the basic civil rights of man.” *Skinner*, 316 U.S. at 541.

173. *Eisenstadt*, 405 U.S. at 453.

174. Daar, *supra* note 156, at 52. Professor Daar goes on to conclude that “[s]tate laws that deprive unmarried individuals of access to ART seem ripe for invalidation under the Constitution on deprivation of liberty grounds.” *Id.* at 54. Professor Robertson, by contrast, notes that “the United States Supreme Court has never recognized a constitutional right to conceive if unmarried” and concludes that the “nightmare vision that respect for procreative liberty would protect the right of a single man or woman to orchestrate the conception, gestation, and birth of a child for that person to rear or allocate to others to rear is simply wrong.” Robertson, *supra* note 170, at 239–40.

175. See, e.g., FLA. STAT. § 742.15(1) (2010) (declaring that only married couples can create legally enforceable contracts for gestational surrogacy); OKLA. STAT. tit. 10, § 553 (2011) (authorizing only married couples to use AI).

176. See *Levy v. Louisiana*, 391 U.S. 68 (1968). For a discussion of these policies, see Appleton, *supra* note 85, at 243–44.

approximating the status of the child born outside marriage to that of the child born within marriage.”¹⁷⁷ The UPC amendments on assisted reproduction attempt to treat ART children on the same basis as those conceived through coitus. Thus, it is critical to include all children of assisted reproduction in these statutes. The attempt to decrease out-of-wedlock births by stigmatizing their offspring failed miserably; this same attempt with ART children is likely to fail as well.

E. How Should Gestational Carrier Agreements Be Enforced?

Whether gestational carrier or surrogacy agreements should be enforceable has been debated since a highly publicized Scotland Yard investigation of a surrogate in England in 1985¹⁷⁸ and the *Baby M* case in the United States in 1986.¹⁷⁹ Opponents of surrogacy and gestational carrier agreements argue, for example, that the contracts commodify women and children, that it is impossible to fairly enforce an agreement on an experience such as pregnancy, and that the arrangements prey on those with fewer resources and standing in society.¹⁸⁰

As with ART generally, most states do not have legislation or case law that determines the enforceability of these agreements.¹⁸¹ Among the states willing to enforce gestational carrier agreements, the procedures by which intended parents become legal parents differ greatly. At one end of the spectrum, several states declare that the intended parents are the legal parents of the child as soon as the preembryo is implanted,¹⁸² or upon the child’s birth.¹⁸³ At the other end of the spectrum are states that require judicial involve-

177. Mary Ann Glendon, *Marriage and the State: The Withering Away Of Marriage*, 62 VA. L. REV. 663, 714 (1976).

178. *January 4, 1985: Inquiry Over ‘Baby-For-Cash’ Deal*, BBC: ON THIS DAY, http://news.bbc.co.uk/onthisday/hi/dates/stories/january/4/newsid_2495000/2495857.stm (last visited Feb. 25, 2012).

179. *In re Baby M*, 537 A.2d 1227 (N.J. 1988); see also Darra L. Hofman, ‘Mama’s Baby, Daddy’s Maybe’: A State-By-State Survey of Surrogacy Laws and Their Disparate Gender Impact, 35 WM. MITCHELL L. REV. 449, 452 (2009); Carla Spivack, *The Law of Surrogate Motherhood in the United States*, 58 AM. J. COMP. L. 97, 99 (2010) (discussing *Baby M* case).

180. See Hofman, *supra* note 179, at 452 for a summary of these and other arguments against surrogacy.

181. See *id.* at 454.

182. See, e.g., N.D. CENT. CODE § 14-18-08 (2009).

183. ARK. CODE ANN. § 9-10-201 (2011) (although a court order is required to issue a substituted birth certificate naming the intended mother, and not the gestational carrier, as the mother); 750 ILL. COMP. STAT. 47/20, 47/25 (2010) (other requirements include, *inter alia*, proof of the medical need for a gestational carrier); NEV. REV. STAT. ANN. § 126.045 (West 2011) (allowing only married heterosexual couples to be declared the legal parents).

ment to establish parentage, either before ART begins¹⁸⁴ or after the child's birth.¹⁸⁵ In states with no legislation or case law, the intended parents usually follow adoption procedures.¹⁸⁶

The question is whether *all* intended parents should go through a judicial process akin to adoption, as the UPA requires, or whether the less onerous procedure of the UPC is better suited to gestational carrier agreements.¹⁸⁷ One disquieting result of the UPA's judicial model is that, in many cases, it requires an intended parent to adopt his or her own genetic child.¹⁸⁸ This occurs when the gestational carrier uses the gametes of one or both intended parents.¹⁸⁹ In *Arredondo v. Nodelman*, for example, a married couple using its sperm and egg contracted with a gestational carrier to carry the child and relinquish the baby upon the birth to the intended parents.¹⁹⁰ The intended, and also genetic, parents brought

184. See N.H. REV. STAT. ANN. § 168-B:16 (2002); VA. CODE ANN. § 20-160(A) (West 2011).

185. E.g., FLA. STAT. § 742.16 (2010); UTAH CODE ANN. § 78B-15-801 (West 2011).

186. Hofman, *supra* note 179, at 466.

187. Another option is the middle ground provided by the ABA Family Law Section's Model Act on Assisted Reproductive Techniques, which gives two alternatives: a judicial preauthorization model, and an administrative model for a self-enforcing agreement provided all parties meet certain requirements (such as being represented by independent counsel). See Christine Metteer Lorillard, *Informed Choices and Uniform Decisions: Adopting the ABA's Self-Enforcing Administrative Model to Ensure Successful Surrogacy Arrangements*, 16 CARDOZO J.L. & GENDER 237, 240–41 (2010).

188. See Nancy D. Polikoff, *A Mother Should not have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the 21st Century*, 5 STAN. J. C.R. & C.L. 201 (2009).

189. Utah requires one of the intended parents to be a genetic parent in order for the agreement to be enforceable against the gestational carrier. See UTAH CODE ANN. § 78B-15-801 to -809 (LexisNexis 2008). Both proposed alternatives of the ABA Family Law Section's Model Act on Assisted Reproductive Techniques require one intended parent to be a genetic parent. See Spivack, *supra* note 179, at 111.

190. *Arredondo v. Nodelman*, 622 N.Y.S.2d 181 (Sup. Ct. 1994); accord *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993) (husband's sperm and wife's egg were used to conceive child and implanted in gestational carrier; court held that where genetics and birth do not coincide, the intent of the parties controls to find husband and wife are the parents); *Hodas v. Morin*, 814 N.E.2d 320 (Mass. 2004) (genetic/intended parents sued for pre-birth judgment of parentage for child born to gestational carrier; court had jurisdiction even though all parties resided outside Massachusetts, because gestational agreement stipulated that birth would take place at a Massachusetts hospital); *Culliton v. Beth Israel Deaconess Med. Ctr.*, 756 N.E.2d 1133 (Mass. 2001) (genetic mother and father of child born to gestational carrier sued hospital to list them on birth certificate as parents in pre-birth order); *T.V. v. N.Y. State Dep't of Health*, 2010 N.Y. Misc. LEXIS 1378 (N.Y. Sup. Ct. Jan. 15, 2010) (husband and wife, the genetic parents of the child implanted in a gestational carrier, filed an uncontested action to name the intended parents—and not gestational carrier and her husband—as parents on birth certificate; the court refused to grant relief, noting that “an alternate remedy exists in the form of an expedited adoption which, notably, was capable of being completed far more expeditiously than this action”), *rev'd*, 929 N.Y.S.2d 139 (2011); *J.F. v. D.B.*, 879 N.E.2d 740 (Ohio 2007) (genetic parents, not gestational carrier, are parents of child); *Belsito v. Clark*, 67 Ohio Misc. 2d 54 (Com. Pl. 1994) (intended parents provided their own sperm and egg for the gestational carrier; asked for declaratory

an uncontested action to list the wife, not the gestational carrier, as the mother on the birth certificate. The New York trial court found it lacked jurisdiction to find maternity because the statute addressed only paternity, and an alternative remedy—adoption—existed for the plaintiffs. While the Supreme Court of New York, Appellate Division, reversed and declared that genetics could be used to establish that the wife was the mother,¹⁹¹ the UPA would require the husband and wife to submit to home visits, among other procedures, in order to adopt their own genetic child. The UPA model increases the costs of a gestational carrier agreement,¹⁹² and may encourage parents to enter into such agreements in states with friendlier legislation, or offshore.¹⁹³

Ultimately the choice between the UPC's self-enforcing agreement and the UPA's judicial model may depend on one's beliefs on the position of a gestational carrier. Is a gestational carrier analogous to a woman giving up her child for adoption, in need of protection from unscrupulous and desperate childless people? Or is a gestational carrier an autonomous person capable of anticipating how she will feel when the child is born, and able to contract away a decision to change her mind? Unlike a typical adoption, the child of a gestational carrier comes into existence solely because of the agreement. Given appropriate safeguards as in the UPC, the gestational carrier should have the freedom to agree, in advance, that she is not the legal mother of the child.

judgment that they were the parents of the child without the necessity of an adoption proceeding); J.R. v. Utah, 261 F. Supp. 2d 1268 (D. Utah 2002) (husband and wife were genetic parents of child implanted in gestational carrier; birth certificate named gestational carrier as mother).

191. T.V., 929 N.Y.S.2d at 151–52.

192. The gestational carrier agreement itself may cost from \$68,000 to over \$100,000. For example, the Fertility Institutes of Los Angeles, New York, and New Mexico, “urge you to compare our complete Surrogacy prices (less than \$68,000.00) with other programs costing over \$140,000.00.” *Surrogacy Solutions*, THE FERTILITY INSTITUTES, http://www.fertility-docs.com/surrogates_fees.phtml?PHPSESSID=485c31e9e80604fff4fcc9cff6080235 (last visited February 25, 2012).

193. See, e.g., Margot Cohen, *A Search for a Surrogate Leads to India*, WALL ST. J., Oct. 9, 2009, at W8; Amelia Gentleman, *India Nurtures Business of Surrogate Motherhood*, N.Y. TIMES, Mar. 10, 2008, at A9; Abigail Haworth, *Womb For Rent: Surrogate Mothers in India*, WEBMD, <http://www.webmd.com/infertility-and-reproduction/features/womb-rent-surrogate-mothers-india> (last visited Feb. 25, 2012) (noting that Indian surrogacy is estimated to be a \$445 million a year business, with fees far lower than in the United States: “Surrogacy costs about \$12,000 in India, including all medical expenses and the surrogate’s fee. In the U.S., the same procedure can cost up to \$70,000.”); Mark Magnier, *A Bundle of Joy With Baggage*, L.A. TIMES, Apr. 19, 2011, at A4.

CONCLUSION

Thousands of Americans use ART to have children every year. Many of them are single or in same-sex relationships, while many state statutes apply only to married heterosexual couples. This vacuum of statutory guidance for thousands of ART children and their parents has two serious consequences, as Professor Robertson has observed. First, it discriminates against certain kinds of infertility. Second, "without resort to the courts and the development of laws to protect the participants, there will be more disputes and problems than would otherwise occur."¹⁹⁴ The key question in assisted reproduction is "not on *whether* but on *how* the new technologies should be used."¹⁹⁵

Adopting either the 2002 UPA or the 2008 amendments to the UPC would be a vast improvement for most states. Either statute resolves the issue of how to establish consent to ART, especially after one partner has died. For states willing to face the reality that same-sex, unmarried and single people are using ART to have children, the UPC is the better alternative to deal with these complex issues. The UPC, unlike any version of the UPA, recognizes that the statutes must include same-sex couples and single parents. The UPC also recognizes that many people enter into agreements with gestational carriers despite significant doubts about their enforceability. In the area of postmortem conception children, the UPC provides useful time limits to ensure that estates need not remain open indefinitely. The main failing of the UPC amendments on PMC children, the presumption of consent for a married decedent in UPC § 2-120, can be easily resolved by adapting the presumption of consent from UPC § 2-121, thus requiring that the decedent deposit gametic material before his or death, and that the gametic material be actually used in conceiving the PMC child.

194. Robertson, *supra* note 170, at 262; see also 7 RICHARD A. LORD, WILLISTON ON CONTRACTS, § 16:22, at 615 (4th ed. 2010) ("Given the fact that the statutes and decisions thus far have not deterred individuals from entering into these surrogacy arrangements, and the likelihood that reproductive technology will continue to develop, it seems probable that the courts have by no means ended their consideration of the many issues surrounding the relationship.").

195. Robertson, *supra* note 170, at 261.